

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1880.

No. 709.387

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
APPELLANT,

THE WESTERN UNION TELEGRAPH COMPANY.

ALIENATION FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI.

APPROVED, Wm. H. HARRIS, S. Atty.

(23,344)

(23,344)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 769.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
APPELLANT,

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI.

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1 United States District Court for the Southern Division of the Southern District of Mississippi.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
v.
WESTERN UNION TELEGRAPH COMPANY.

To the Honorable H. C. Niles, Judge of the District Court of the United States for the Southern Division of the Southern District of Mississippi:

The Louisville & Nashville Railroad Company, a corporation created by, and organized under, the laws of the State of Kentucky, having its principal place of business in the City of Louisville, in the State of Kentucky, and a citizen of the State of Kentucky, brings this, its bill of complaint,

Against

The Western Union Telegraph Company, a corporation created by, and organized under, the laws of the State of New York, and having its principal place of business in the City of New York, and a citizen of said State, and shows unto Your Honor:

I.

That this is a suit between citizens of different states of the United States; viz., between the Louisville & Nashville Railroad Company, a citizen of the State of Kentucky, and the Western Union Telegraph Company, a citizen of the State of New York, and the amount in dispute, between the complainant and defendant, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars,

2 (\$3,000.00); it is brought to enforce a claim to, and to remove a cloud from, the title to real property, situate in the State of Mississippi, within the Southern Division of the United States Southern Judicial District of said State. The real estate, upon which the complainant seeks to enforce a claim, and from the title to which it seeks to remove a cloud, consists of a strip of land, constituting complainant's right of way, lying on each side of its main railroad track, and extending from the dividing line between the County of Jackson, in the State of Mississippi, and the County of Mobile, in the State of Alabama, to the dividing line between the County of Hancock, in the State of Mississippi, and the State of Louisiana, including its bridges in the Counties of Harrison and Hancock, in the State of Mississippi. The property so taken is more particularly described in the several judgment entries hereinafter set out, purporting to be judgment entries of Courts of Eminent Domain.

II.

If complainant does not enforce its said claim, and remove said cloud from its title to said real estate, it will be deprived of its prop-

erty without due process of law, and will also be denied the equal protection of the laws, under color of right arising out of the provision of a legislative enactment of the State of Mississippi. For protection against the taking of its said property, and against such denial to it of the equal protection of the law, Complainant relies upon, and invokes the aid and protection of, so much of the Fourteenth Amendment to the Constitution of the United States, as is in these words:

"No state shall make or enforce any law which shall abridge the privilege and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3 Complainant avers, however, that the alleged condemnation proceedings are void for other reasons shown by the allegations of this bill of complaint, and that it would, therefore, be entitled to the relief prayed for, even had its property not been taken without due process of law, or it denied the equal protection of the law.

III.

The property sought to be condemned formerly belonged to the New Orleans, Mobile & Texas Railroad Company, as Re-organized, but in 1881, Complainant purchased from said Company all of the railroad property then belonging to it, and received a duly executed conveyance thereof, and has, for more than twenty years, owned a fee simple title to, and has, under a claim of ownership, used, occupied, and been in the continuous and exclusive possession of, the right of way and bridges sought to be subjected to the uses of the defendant, the Western Union Telegraph Company, by the condemnation proceedings hereinafter mentioned.

IV.

The Defendant, the Western Union Telegraph Company, owns, maintains, and operates, and for many years has owned, maintained, and operated, a line of telegraph poles and wires upon and along the said right of way, from the dividing line between the State of Alabama and the State of Mississippi, to the dividing line between the State of Mississippi and the State of Louisiana. Said telegraph line is, and has for many years been, located, maintained, and operated upon Complainant's said right of way, and upon or attached to its said bridges, under a contract between the Complainant and the Defendant, the Western Union Telegraph Company, and not otherwise, and by one of its provisions, said contract may be terminated by either of the parties thereto at the expiration of one year, after written notice shall have been given by one of the parties thereto, to the other of said parties, of a desire or intention to terminate the same. Said contract will terminate on

4 August 17, 1912, pursuant to a notice that has been given thereof by the defendant, as provided by the terms of said contract.

V.

Under an alleged power of eminent domain, which it claims is vested in it by the laws of the State of Mississippi, the Defendant, the Western Union Telegraph Company, attempted to obtain, by the proceedings herein alleged and complained of, the right to continue the use of Complainant's said right of way for the maintenance and operation of said Western Union Telegraph Company's said existing line of poles and wires thereon, without any intention to construct any new telegraph line, and to this end, the said Defendant, the Western Union Telegraph Company, presented three separate applications for the condemnation and use of the Defendant, the Western Union Telegraph Company, of parts of Complainant's said right of way and bridges lying in said respective counties, as hereinafter alleged.

VI.

A copy of each of said applications are hereto attached, and made parts hereof, and are marked Exhibits "A", "B", and "C", respectively.

VII.

Section 1854, Chapter 43, of the Code of Mississippi of 1906, provides as follows:

"Any person or corporation having the right to condemn private property for public use shall exercise that right as provided in this chapter, and not otherwise, except as specified in the Chapter on landings, mill, and mill dams and roads, ferries and bridges."

Section 1856, which is likewise part of Chapter 43 of the Code of Mississippi of 1906, provides as follows:

5 "When any person or corporation having the right to do so shall desire to exercise the right of eminent domain, he or it shall make application therefor, in writing, and the owners of the property sought to be condemned, and the mortgagees, trustees, or other persons having an interest therein, or a lien thereon, shall be made defendants thereto, which shall state, with certainty, the right, and describe the property sought to be condemned, showing that of each defendant separately. Applications shall be presented to the Clerk of the Circuit Court of the County who shall endorse thereon his appointment of a competent Justice of the Peace of the county in which the property, or some part of it, is situated, to constitute, with a jury, a special court of eminent domain; and he shall fix the time and place in the county for the organization thereof."

The application of which Exhibit "A" is a copy, was presented to A. J. Ramsey, Jr., the Deputy Clerk of the Circuit Court of Harrison County, Mississippi, and thereupon, said Deputy Clerk made a separate order, in writing, appointing one H. D. Moore, a Justice of the Peace of Harrison County, Miss., to try, with a jury to be drawn, the issue between the Complainant and the Defendant, and fixed the 27th day of December, 1911, at 10 o'clock A. M., in the Court House of Harrison County, Miss., for the organization of a court of eminent domain, but made no endorsement of such appointment upon the application presented to him by the Complainant.

The application, of which Exhibit "B" is a copy, was presented by Complainant to one W. C. Havens, the Deputy Clerk of the Circuit Court of Jackson County, Miss., and upon the presentation of such application to the said Havens, he, the said Havens, made an order, in writing, appointing one Chas. E. Chidsey, a Justice of the Peace of Jackson County, Miss., to try, with a jury which was summoned, the issue between the Complainant and the Defendant, and fixed the 10th day of January, 1912, in the Court House of Jackson County, Mississippi, for the organization of a special court of eminent domain, but said appointment was not endorsed upon the application.

6 Thereafter, on the 29th day of December, 1911, Fred Taylor, who was the Clerk of the Circuit Court of Jackson County, made an endorsement upon said application, and re-issued and caused a new summons to be served upon the Complainant, the said endorsement reading as follows:

"WESTERN UNION TELEGRAPH COMPANY
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY et als.

I, Fred Taylor, Clerk of the Circuit Court of Jackson County, do hereby certify that the petition, upon which this endorsement is made, was filed in my office on the 25th day of November, A. D., 1911, and immediately upon the filing of said petition, I appointed and constituted Charles E. Chidsey, a duly qualified Justice of the Peace of said County, to try, with a Jury drawn according to law, the issue between the Western Union Tel. Co. and the defendant, the Louisville & Nashville R. R. Co., et als., which appointment was made in writing and duly filed with the papers in the cause, and I fixed 10 o'clock A. M., of the 10th day of January, A. D. 1912, at the Court House of said County at Pascagoula, Miss., as the time and place for the hearing of said cause, all of which was done in writing and duly filed in the records of this case.

Now, therefore, in pursuance of said acts, and in order to further evidence the same, I now on this the 29th day of Dec., make this endorsement upon said petition, and also attach and affix to said petition the required appointment and designation made by me at the time said petition was filed.

Given under my hand, this the 29th day of Dec., A. D. 1911.

FRED TAYLOR,
Clerk Circuit Court, Jackson C-ty."

Upon the hearing of the application by the alleged court of eminent domain, on the 10th day of January, 1912, the Defendant, the Western Union Telegraph Company, amended its said application, and a copy of said amendment is hereto attached, marked Exhibit "D", and made a part hereof.

7 The application, of which Exhibit "C" is a copy, was presented by the Complainant to W. W. Stockstill, the Clerk of the Circuit Court of Hancock County, Mississippi, and he, the said

W. W. Stockstill, made an order, in writing, appointing John A. Breath, a Justice of the Peace of said County, to try, with a jury to be drawn, the issue between the Complainant and the Defendant, and fixed the 8th day of January, 1912, in the Court House of Hancock County, Mississippi, for the organization of a special court of eminent domain, but said appointment was not endorsed upon the application.

Thereafter, on the 30th day of December, 1911, the said W. W. Stockstill, Clerk of the Circuit Court of Hancock County, made an endorsement upon the application, and re-issued and caused a new summons to be served upon the Complainant, the said endorsement reading as follows:

"WESTERN UNION TEL. CO.
vs.
LOUISVILLE & NASHVILLE R. R. CO. et als

I, W. W. Stockstill, Clerk of the Circuit Court of Hancock County, do hereby certify that the petition, upon which this endorsement is made, was filed in my office on the 28th day of Nov., A. D. 1911, and immediately upon the filing of said petition, I appointed and constituted Mr. J. N. O. Breath, a duly qualified Justice of the Peace of said County, to try, with a jury drawn according to law, the issue between the Western Union Tel. Co. and the defendants, the Louisville & Nashville R. R. Co., et als., which appointment was made in writing and duly filed with the papers in this case, and I fixed 10 o'clock A. M., of the 8th day of January, A. D. 1911, at the Court House of said County in Bay St. Louis, as the day and place for the hearing of said cause, all of which was done in writing and duly filed in the records of the case.

Now, therefore, in and by reason of said action, and in order to further evidence same, I now, on the 30th day of December, make this endorsement upon said petition, and also attach to said petition the original appointment and designation made by me at the time said petition was filed.

Given under my hand this the 30th day of December, A. D. 1911.

[SEAL.] (Signed) W. W. STOCKSTILL,
Clerk Circuit Court, Hancock County,

VIII.

On the 27th day of December, 1911, the said H. D. Moore, and he jury drawn for that purpose, organized what purported to be a court of eminent domain.

Before the said Justice of the Peace, and jury, purporting to act as a court of eminent domain, entered upon the hearing of the testimony, the Defendant in said proceeding, the Louisville & Nashville Railroad Company, protested against proceeding with the hearing of the application of the Western Union Telegraph Company, to condemn any portion of the right of way and bridges of the Complainant, on the ground that no competent Justice of the Peace had been appointed by endorsing such appointment on the application for condemnation, as required by law, and the said H. D. Moore was

without authority to proceed with said condemnation proceeding. Disregarding said protest, the said alleged court of eminent domain proceeded to hear evidence as to the value of the property to be taken, and after said evidence had been heard, the said jury returned a verdict in the following language:

"We, the jury, find that the Defendants, the New Orleans, Mobile & Texas Railroad Company, as Re-organized, the Louisville & Nashville Railroad Company, and the Farmers Loan & Trust Company, will be damaged, by the taking of their property for public use, in the sum of \$150.00."

Said verdict was signed by all the jurors.

Upon the return of said verdict, the said alleged court of eminent domain, entered the following judgment:

9 "In this case the claim of the Western Union Telegraph Co. to have condemned certain lands and property named in the application, to-wit:—So much of the right of way of the main line of the Louisville & Nashville R. R. Co., as lies in Harrison County, Miss., running from a point on the said right of way on the line dividing the Counties of Harrison and Jackson, which said point is located in the middle of the Bay of Biloxi, and on the bridge of the defendant Railroad Company spanning the said Bay of Biloxi; on the east, and thence extending westwardly through the County of Harrison to the dividing line between said County and Hancock County, on the west which is a point in the middle of the Bay of St. Louis, and on the bridge of the defendant Railroad Company, spanning said Bay of St. Louis, being a distance of thirty miles more or less, and which route is shown and delineated on a map of blue print annexed to applicant's Petition as Exhibit "A". Said right of way being 100 feet wide and constituting with those portions of the bridges lying in Harrison County a continuous strip of land extending from Jackson County line on the east to the Hancock County line on the west, and being right of way over which the main line of the defendant between New Orleans and Mobile is now constructed and being operated. Together with the right to attach poles, cross arms and wires to such portions of said bridges above mentioned as lie within said Harrison County in such convenient and proper way, and by such proper and prudent means as will in no wise endanger or impair said bridges, and will in no wise hamper, impede, obstruct, or interfere with the use thereof by said defendants and other authorized to use same.

This condemnation for the purpose of permitting said Western Union Tel. Co. to erect one line of poles with cross arms and wires upon and along said right of way and bridges of said defendants, all in the manner and with all the safeguards set forth in petitioner's petition, that is to say, in such manner and at such distance from defendants' track as in no way to interfere with the operation of

10 trains of said defendants or with any proper or legitimate use thereof by defendants, or the use by any telegraph or telephone company now existing thereon, and so as not to be dangerous to persons or property, and subject to all the stipulations and agreements in said petition contained, being the property of the L. & N.

R. R. Co. and the New Orleans, M. & T. R. R. Co., as Re-organized, and in which the Farmers' Loan & Trust Co. is interested as the Trustee in certain mortgages was submitted to a jury composed of: A. V. Marshall, H. J. Gillen, John Wein, Armond Sellier, J. B. Ladnier, Tom Cousins, J. J. Bond, W. W. Harrison, Joseph Saucier, L. A. Witter, F. S. Bond, and A. F. Breland, on the 28th day of Dec., A. D. 1911, and the jury returned a verdict fixing the defendants' due compensation and damages at \$150.00, and the verdict was received and entered. Now, upon payment of said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application.

Let the applicant pay the costs, for which let execution issue Dec. 28, 1911.

H. D. MOORE,
Justice of the Peace."

The Western Union Telegraph Company tendered to the Complainant the amount of damages so adjudged, with interest, but the same was not accepted by Complainant.

On the 8th day of January, 1912, the said John A. Breath, Justice of the Peace as aforesaid, together with the jury drawn, met at the Court House of Hancock County, and organized what purported to be a Special Court of eminent domain.

Before said alleged Court of eminent domain proceeded to take testimony, the Defendant protested against proceeding with the hearing of the application of the Defendant to condemn any portion of the right of way and bridges of the Complainant, upon the ground that no competent Justice of the Peace had been appointed by an endorsement upon Complainant's application for condemnation, and that the said John A. Breath was therefore without jurisdiction or authority to proceed in said matter. The said alleged court of 11 eminent domain disregarded said protest, and proceeded to hear the evidence as to the value of the property to be taken, and after said evidence had been heard, the jury rendered a verdict in the following language:

"We the jury find that the Defendants, the New Orleans, Mobile & Texas Railroad Company, as Re-organized, the Louisville & Nashville Railroad Company, and the Farmers Loan & Trust Company, will be damaged by the taking of their property for public use, in the sum of \$650.00."

Said verdict was signed by all the jurors.

Upon the return of said verdict, the said court of eminent domain entered the following judgment:

"In this case the claim of the Western Union Tel. Co. to have condemned certain lands and property named in the application, to-wit:—So much of the right of way of the main line of the Louisville & Nashville R. R. Co. as lies in Hancock County, Mississippi; running from a point on said right of way on the dividing line between the counties of Hancock and Harrison on the bridge crossing the Bay of St. Louis on the East and thence extending through the county of Hancock to the head of the stream of East Pearl River, which is the

western boundary of the State of Mississippi, separating same from the State of Louisiana; being a distance of seventeen (17) miles more or less, and which said route is shown or delineated on a map or blue print annexed to petitioner's petition marked Exhibit "A". The said right of way being about one hundred (100) feet wide, and constituting together with that portion of the bridge over the Bay of St. Louis lying in Hancock County, and that portion of the East Pearl River bridge lying in the State of Mississippi, one continuous and contiguous strip and body of land and track extending from the Harrison County line on the east, to the Louisiana line on the west, and being the right of way over which the main line of said defendants between New Orleans and Mobile is now constructed and being operated. Together with the right to attach poles, cross arms and wires to such portions of the bridges over Bay St. Louis and East Pearl

River above mentioned, as lie within said Hancock County, in 12 such convenient and proper way, and by such proper and prudent means, as will in no wise endanger or impair said bridges, and will in no wise, hamper, impede, obstruct, or interfere with the use thereof by defendants, and all others authorized to use same. This condemnation being for the purpose of permitting said Western Union Tel. Co. to erect one line of poles with cross arms and wires upon and along said right of way and bridges of said defendant, all in the manner and with all the safeguards set forth in petitioner's petition, that is to say, in such manner and at such distance from defendants' track as in no way to interfere with the operation of trains of said defendants, or with any proper or legitimate use thereof by defendants, or the use by any telegraph or telephone company now existing thereon, and so as not to be dangerous to persons or property, and subject to all the stipulations and agreements in said petition contained, being the property of the L. & N. R. R. Co. and the N. O. M. & T. R. R. Co., as re-organized, and in which the Farmers Loan & Trust Co. is interested as the Trustee in certain mortgages, was submitted to a jury composed of: J. P. Adams, Elmer Bourgeois, A. A. Hart, C. L. Joyner, Alfred Koenan, Salvator Nicaise, Alfred Besancen, Thos. J. Conway, G. H. Vairin, Emile Pene, Louis Tricon, and H. W. Driver, on the 8th and 9th days of Jan., A. D. 1912, and the jury returned a verdict fixing the defendants' due compensation and damages at six hundred and fifty dollars, and the verdict was received and entered. Now upon payment of said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application.

Let the applicant pay the costs for which let execution issue.

Jan. 9, 1912.

(Signed)

J. A. BREATH,
Justice of the Peace.

The Defendant, the Western Union Telegraph Company, thereafter tendered to Complainant, the amount of damages so adjudged, with interest, but the same was not accepted by the Complainant.

On the 10th day of January, 1912, the said Charles E. 13 Chidsey, Justice of the Peace as aforesaid, together with the

jury drawn, met at the Court House of Jackson County, and organized what purported to be a Special Court of eminent domain.

Before said alleged court of eminent domain proceeded to take testimony, the Defendant protested against proceeding with the hearing of the application of the Defendant to condemn any portion of the right of way of the Complainant, upon the ground that no competent Justice of the Peace had been appointed by an endorsement upon Complainant's application for condemnation, and that the said Chas. E. Chidsey was therefore without jurisdiction or authority to proceed in said matter. The said alleged court of eminent domain disregarded said protest, and proceeded to hear the evidence as to the value of the property to be taken, and after said evidence had been heard, the jury rendered a verdict in the following language:

"We the jury find that the Defendants, the New Orleans, Mobile & Texas Railroad Company, as Re-organized, the Louisville & Nashville Railroad Company, and the Farmers Loan & Trust Company, will be damaged by the taking of their property for public use, in the sum of \$150.00."

Said verdict was signed by all the jurors.

Upon the return of said verdict, the said court of eminent domain entered the following judgment:

**"STATE OF MISSISSIPPI,
Jackson County:**

Special Court of Eminent Domain.

WESTERN UNION TELEGRAPH COMPANY

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY et als.

In this case, the claim of the Western Union Telegraph Company to have condemned certain lands and property named in the application, to-wit—So much of the right of way of the main line of the Louisville & Nashville Railroad Company, as lies in Jackson County, Mississippi, running from a point on the right of way of said Railroad Company on the dividing line between the States of 14 Alabama and Mississippi, near Pecan Station on the East, thence extending through the County of Jackson to the dividing line separating the Counties of Jackson and Harrison in the State of Mississippi, being a distance of twenty-two (22) miles more or less, and which said route is shown and delineated on a map or blue print filed with petitioner's petition marked Exhibit "A," excepting so much thereof as consists of bridges in said Jackson County. Said right of way being one hundred (100) feet wide, and constituting the right of way of said Railroad Company lying in Jackson County, Mississippi, and extending from the Alabama line on the East to the Harrison County line on the West, being the right of way over which the main line of said Railroad between New

Orleans and Mobile is now constructed and being operated, excepting so much thereof as consists of bridges in said Jackson County.

This condemnation being for the purpose of permitting said Western Union Telegraph Company to erect one line of poles with cross arms and wires upon and along said right of way and bridges of said defendant, all in the manner and with all the safeguards set forth in petitioner's petition, that is to say—in such manner and at such distance from defendant's track as in no way to interfere with the operation of trains of said defendants or with any proper or legitimate use thereof by defendants, or the use by any telegraph or telephone company now existing thereon and so as not to be dangerous to persons or property, and subject to all the stipulations and agreements in said petition contained, being the property of the Louisville & Nashville Railroad Company, and in which the Farmers Loan & Trust Company is interested as the Trustee in certain mortgages was submitted to a jury composed of—

15 on the 10th and 11th days of January, A. D. 1912, and the jury returned a verdict fixing the defendants' due compensation and damages at One hundred and fifty dollars (\$150.00) and the verdict was received and entered. Now upon payment of said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application.

Let the applicant pay the costs for which let execution issue."

— • —
Justice of the Peace.

Jan. 11, 1912.

IX.

Chapter 43 of the Code of Mississippi provides, as hereinabove shown, for the creation of a special statutory court of eminent domain, but said court, under said provisions, can be created and given jurisdiction only by proceeding in strict conformity with the provisions of said chapter. By the provisions of said chapter, hereinabove set out, authority is conferred upon the Clerks of said several courts to appoint a competent Justice of the Peace to serve as part of a special court of eminent domain, and to cause a jury to be drawn and summoned, but does not confer such powers upon the Deputies of such Clerks, or upon any other person.

Said Chapter 43 authorizes and empowers the said Clerks of the Circuit Courts to appoint a competent Justice of the Peace by endorsing the same upon the application of condemnation so presented to them, but does not authorize such Clerks to appoint such Justices of the Peace by a separate order, not endorsed upon such application.

Complainant shows to the Court that the whole proceedings for the condemnation of its right of way attempted to be had in Harrison, Jackson and Hancock Counties, are void, because the several Justices of the Peace who presided over, and acted as parts of said alleged courts of eminent domain, were not appointed by endorse-

ments made upon the applications presented by the Western Union Telegraph Company.

16 Complainant shows to the Court that in addition to this, the proceedings under which condemnation of its right of way in Jackson and Harrison Counties were attempted, were void for the further reason:

1. Because the applications by which the said proceedings purported to have been commenced, were not presented to the several Clerks of said Counties.

2. Because the Clerks of said Counties made no appointment of a competent Justice of the Peace to act in said proceedings.

X.

Complainant further shows to the Court that Chapter 43 of said Code of Mississippi, which is the chapter referred to in Section 929 of the Code of Mississippi, giving a right of condemnation to telegraph and telephone companies, prescribes the method in which eminent domain shall be exercised by persons and corporations having the power of eminent domain, but neither said chapter, nor said section 929, nor any other law of the State of Mississippi, extended the right to exercise said power of eminent domain to property which was already devoted to public use, and Complainant's said right of way was, at the time that said condemnation proceedings were instituted, still is, and for many years prior thereto has been, devoted to public use, viz., to the use of Complainant for the purposes of a common carrier railroad and right of way therefor.

XI.

Complainant further shows to the Court that said Western Union Telegraph Company had no power or authority to condemn, to its use, any portion of Complainant's right of way and bridges, in that:

17 (a) The only right which it had or claimed to have, to condemn the said right of way and bridges of Complainant was conferred upon it by Sections 925 and 929 of the Code of Mississippi of 1906, and by the provisions of Chapter 43 of said Code of Mississippi, prescribing the method in which the right of eminent domain should be exercised.

The said Section 925 of the Code of Mississippi authorizes all Companies or Associations of persons, incorporated or organized for the purpose of constructing telegraph and telephone lines, to construct the same, and to set up and erect their posts and fixtures along and across any of the public highways, streets, and waters, and along or across all turn-pikes and railroads, but it does not authorize such telegraph and telephone companies to condemn the rights of way of railroads, or to set up and erect their posts and fixtures across or along said rights of way without the consent of the said railway companies, and Complainant did not consent to the use of its right of way or bridges, or any part thereof, for the construction of said telegraph lines of the Defendant, the Western Union Telegraph Company.

(b) Said Section 929 of the Code of Mississippi of 1906 gave to telegraph and telephone companies the power to exercise the right of eminent domain as provided in the chapter of the Code of Mississippi on that subject, for the purpose of constructing new lines, but it did not give to such telegraph and telephone companies any right of eminent domain for the continuance and maintenance of any existing telegraph line. So much of said Section as relates to said matter reads as follows:

"Telegraph and telephone companies, for the purpose of constructing new lines are empowered to exercise the right of eminent domain as provided in the chapter on that subject."

Complainant further shows to the Court that neither under Sections 925 and 929, nor under any other law of the State of Mississippi, was there vested in the Defendant, the Western Union Telegraph Company, any right or power to condemn, to its use, any portion of the said right of way and bridges of the Complainant, the Louisville & Nashville Railroad Company, for the purpose of maintaining an existing telegraph line.

18 Complainant further shows to your Honor that although it is alleged in the several petitions of the Western Union Telegraph Company that the telegraph line for which it desired to condemn a right of way was to be a new line, in fact and in truth the said Western Union Telegraph Company did not desire said right of way for the purpose of erecting any new telegraph line, nor did it intend to use the same for that purpose. It desired and intended to obtain said right of way for the purpose of maintaining its said existing telegraph line thereon. This was shown by the testimony introduced by the Defendant, the Western Union Telegraph Company, in each of said condemnation proceedings, and the said Western Union Telegraph Company had no right to condemn the property of the Defendant for said purpose.

XII.

By the 17th Section of the Constitution of Mississippi, it was as provided as follows:

"Private property shall not be taken or condemned for public use except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law, and whenever an attempt is made to take private property for a use alleged to be public, whether the contemplated use be public shall be a judicial question, and as such determined without regard to legislative assertion that the use is public."

As heretofore alleged, the only right vested in the Complainant, the Western Union Telegraph Company, by the laws of Mississippi to condemn property to its use, as it has attempted to condemn the right of way of this Complainant, was conferred upon it by Section 929 of the Code of Mississippi, and by said Section it is only authorized to condemn such property "for the purpose of constructing new lines," and a new line is constructed within the meaning of said statute—as declared by the Supreme Court of Mississippi, whenever the

19 telegraph company changes its route and runs its line in a different route from that already occupied by it, involving the necessity of taking and occupying lands not before occupied by it.

By Section 925 of the Code of Mississippi, telegraph companies are authorized to construct their lines along and across public highways, streets and waters, and along and across turn-pikes, railroads, canals, and other public lands, but it is expressly provided that "the same shall be so constructed and placed as not to be dangerous to persons or property, or interfere with the common use of roads, streets, or waters, or with the convenience of any land owner, more than may be unavoidable."

Under the provisions of Chapter 43 of the Code of Mississippi, the several Clerks of said Circuit Courts to whom the law requires the applications for condemnation of lands to be presented, had no power or authority to hear or determine, upon the presentation of said applications to them, nor did said Deputy Clerks have any power or authority to hear or determine, upon the presentation of such applications to them:

1. Whether the use for which the Western Union Telegraph Company sought to condemn the property of the Complainant was a public use, or,

2. Whether the property of Complainant sought to be condemned by the Western Union Telegraph Company was already devoted to a public use, and whether, if so devoted, it was subject to condemnation by the said Western Union Telegraph Company for the purpose set out in its several applications, or,

3. Whether the Western Union Telegraph Company sought, by said several applications, to condemn the property of Complainant for the use of a new line, or only for the maintenance of an existing line, or,

4. Whether the construction of the said telegraph line, as proposed under said applications for condemnation, would be so placed as not to be dangerous to persons or property, or interfere with the common use of Complainant's right of way more than might be unavoidable, or,

20 5. As to what interest Complainant had in the property sought by the said Western Union Telegraph Company to be condemned.

So much of said Chapter 43 as relates to this matter is contained in Section 1856 of the Code of Mississippi, and reads as follows:

"When any person or corporation having the right so to do shall desire to exercise the right of eminent domain, he or it shall make application therefor, in writing, and the owners of the property sought to be condemned, and mortgagees, trustees, or other persons having an interest therein, or a lien thereon, shall be made defendants thereto, which shall state with certainty the right and describe the property sought to be condemned, showing that of each defendant separately. The application shall be presented to the Clerk of the Circuit Court of the County, who shall endorse thereon his appointment of a competent Justice of the Peace of the county in

which the property, or some part thereof, is situated, to constitute, with a jury, a special court of eminent domain, and he shall fix the time and place in the county for the organization thereof."

Under Section 1858 of the Code of Mississippi, which is a part of said Chapter No. 43, the said sheriffs of the several counties were required to execute the summons and venire facias, provided for by the endorsements of the clerks as aforesaid, and make due return thereof to the Justices of the Peace, at times and places fixed; and under Section 1862 of the Code of Mississippi, which is also a part of said Chapter 43, the said Justices of the Peace were required to organize said juries, and were expressly denied the right to quash the proceedings or dismiss the court of eminent domain for any cause, and said section expressly prohibits an appeal from said proceedings until after a verdict is rendered by the jury. So much of said Section as denies to the said Justices of the Peace the right to quash the said proceedings, and prohibits an appeal until after the verdict is

rendered, reads as follows:

21 "The Justice of the Peace shall not for any cause quash the proceedings or dismiss the court of eminent domain, but must proceed with the condemnation. No irregularity in drawing, summoning, or empaneling the jury shall vitiate the verdict or judgment, and no appeal or certiorari shall be allowed until after verdict by the jury."

By Section 1865 of the Code of Mississippi, which is also part of said Chapter 43, the form of the charge to be given the jury, by the Justice of the Peace, is prescribed, and said form of charge expressly submits to the jury only the determination of the amount of damages which the defendant, in the condemnation proceedings, will sustain by the taking of his or their property. The provisions of Section 1865 relating thereto, are as follows:

"The Justice shall instruct the jury, in writing, in the following words:

"The defendant is entitled to recover damages in this case, and it devolves on you honestly and impartially to estimate the sum thereof, according to the evidence adduced on the trial, the weight and credibility of which you are the sole judges. The defendant is entitled to due compensation, not only for the value of the property to be actually taken as specified in the application, but also for damages, if any, which may result to him as a consequence of the taking; and you are not to deduct therefrom anything on account of the supposed benefits incident to the public use for which the application is made."

Under Section 1866, which is also a part of said Chapter 43, the form of the verdict to be returned is prescribed. Said Section reads as follows:

"We, the jury, find that the defendant (naming him) will be damaged, by the taking of his property for the public use, in the sum of — dollars."

Under Section 1867, which is also a part of said Chapter 43, the form of judgment to be rendered is prescribed, and the language of said Section, in regard thereto, is as follows:

22 "Upon the return of the verdict, the court shall enter a judgment as follows, viz:

'In this case the claim of (naming him or them) to have condemned certain lands named in the application, to-wit: (here describe the property), being the property of (here name the owner) was submitted to a jury composed of (here insert their names) on the — day of —, A. D. —, and the jury returned a verdict fixing said defendant's due compensation and damages at — dollars, and the verdict was received and entered. Now, upon payment of the said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application. Let the applicant pay the costs for which let execution issue.' J. P.'

Section 1871 of said Code, which is also a part of said Chapter 43, authorizes an appeal to the Circuit Court, from the finding of the jury of the special eminent domain court, by executing a bond, with sufficient sureties, payable to his adversary, in a penalty of \$300.00, conditioned to pay all costs that may be adjudged against it, which bond is required to be given within twenty days after the rendition of the verdict, but said section expressly provides that, if the appeal be by the defendant, it shall not operate as a supersedeas, nor shall the right of the complainant to enter in and upon the land of the defendant, and to appropriate the same to public use, be delayed. So much of said Section as relates to this matter, reads as follows:

"Every party shall have the right to appeal to the circuit court from the finding of the jury in the special court by executing a bond with sufficient sureties, payable to his adversary, in a penalty of three hundred dollars, conditioned to pay all costs that may be adjudged against him, which bond shall be given within twenty days after the rendition of the verdict, and may be approved by the justice. If the appeal be by the defendant, it shall not operate as a supersedeas, nor shall the right of the applicant to enter in and upon the land of the defendant and to appropriate the same 23 to public use be delayed. Upon appeals, the issues shall be tried de novo in the circuit court, which shall try and dispose of it as other issues, and enter all proper judgments."

Upon such appeal to the Circuit Court, that Court has no jurisdiction, judicial power or authority under the statutes of the State of Mississippi, as construed by the highest court in that State, to hear, permit evidence upon, or determine the question of the right, authority, or necessity of the Western Union Telegraph Company to condemn for its telegraph line the right of way of a railroad company, or the question of obstruction or non-obstruction, interference or non-interference with the ordinary common use, traffic, or travel on the railway company's railroad laid on such right of way, or the question of the dangerousness to persons or property, which would be caused by the construction, operation, and maintenance perpetually of the telegraph company's line of poles, wires, cross-arms, fixtures, etc., on such railroad right of way as proposed, and said statutes exclude all judicial inquiry into or upon the questions afore-

said, as well as to whether or not the right of way for which the condemnation is sought is public, or as to whether or not the telegraph line for the construction, operation, and maintenance of which the condemnation is sought, is a new or old line. But the jurisdiction on such appeal of the Circuit Court under said statutes, construed as aforesaid, is confined to the single question of reviewing the verdict of the jury before the Justice of the Peace as to the amount of damages that will be sustained by the railroad company and such Justice of the Peace likewise under said statutes, construed as aforesaid, has and exercises no judicial power or authority in condemnation proceedings before him, but acts therein as a ministerial officer only.

XIII.

Complainant shows to the court that, although the said Western Union Telegraph Company, as hereinabove alleged and shown, has no right to condemn any portion of Complainant's right of way and its use, and although no eminent domain court was created 24 and given jurisdiction to act upon said several applications of the Western Union Telegraph Company to condemn Complainant's said right of way and bridges, or any part thereof, Defendant has, under provisions of said Section 43 of the Code of Mississippi, obtained what purports to be judgments of courts of eminent domain, condemning to the use of the Western Union Telegraph Company portions of the right of way and bridges of the Complainant, the Louisville & Nashville Railroad Company, and in and by said condemnation proceedings Complainant has been deprived of property without due process of law in that its said property has been condemned without its having had an opportunity to be heard as to whether the use for which the said property is so proposed to be taken is a public use, or as to whether the purpose for which said property is condemned is for the erection of a new line, or only for the maintenance of an existing line, or as to whether or not said line is proposed to be constructed and placed so as not to be dangerous to persons and property, or so as not to interfere with the convenience of Complainant more than is unavoidable, or as to what interest Complainant had in its said property, all in violation of the Fourteenth Amendment to the Constitution of the United States, and Complainant here invokes the protection of the provisions of said Fourteenth Amendment, and claims the right, under the provisions thereof, to have the cloud placed upon its property, by said several alleged judgments of condemnation, removed.

XIV.

Complainant further shows to the Court that said proceedings under which said alleged judgments were rendered, were void for the following reasons:

1. Because they were not rendered by courts of eminent domain constituted as provided by law.
2. Because the property of the Defendant sought to be condemned

was already devoted to public use, and was not subject to condemnation in said proceedings.

25 3. Because the purpose for which said condemnation was sought was for the maintenance of an existing line, and not for the construction of a new line.

4. Because the Defendant was not afforded an opportunity to be heard upon said several questions.

5. Because the Defendant was not afforded an opportunity to be heard as to whether or not the construction of said new line would be dangerous to persons or property.

6. Because the Complainant was not afforded an opportunity to be heard as to whether said line would be constructed and placed so as not to interfere with the convenience of Complainant more than is unavoidable.

7. Because the Defendant was not afforded an opportunity to be heard as to what was Defendant's interest in the property sought to be condemned.

And although said several proceedings, and the judgments rendered therein, violated the Fourteenth Amendment to the Constitution of the United States in said several particulars, the said Western Union Telegraph Company intends to, and will, enter upon and take possession of a portion of Complainant's said right of way and erect its line of posts and wires, and other appliances, thereon, and attach its posts and other appliances to Complainant's bridges, claiming the right to do so under said several proceedings and alleged judgments of condemnation, unless restrained from so doing by an injunction of this Honorable Court.

XV.

Complainant shows to your Honor that the Western Union Telegraph Company is, and has been for many years, engaged in doing a corporate telegraph and cable business in the Southern Division of the Southern United States Judicial District of the State of Mississippi, and it has, for many years, had and maintained 26 offices and agents in said Division of said Judicial District.

By Section 9191 of the Code of Mississippi, it is provided as follows:

"Any corporation claiming existence under the laws of any other State or of any country foreign to the United States found doing business in this State shall be subject to suit here to the same extent that corporations of this State are, by the laws thereof, liable to be sued by any resident of this State, and also so far as relates to any transaction had in whole or in part within this State, or any cause of action arising here. And any corporation having any transaction with persons or having any transaction concerning property situated in this State, through any agency whatever, acting for it within this State, shall be held to be doing business here within the meaning of this section."

By Section 920, it is provided that, "Process may be served upon any agent of said corporation found within the county where the suit is brought, no matter what character of agent such person may be."

XVI.

The Complainant states that it is and has been for a great many years a common carrier by railroad engaged in interstate commerce as well as intrastate commerce in the State of Mississippi and among that State and other States of the United States subject to the Act of Congress to regulate commerce, approved February 4, 1887, and the amendments thereto, and its system of railroads located in Mississippi and outside of that State are military and post roads within the true intent and meaning of the Act of Congress, approved June 15, 1866. (Sec. 5258 U. S. Compiles Statutes 1901), and the Act of Congress approved June 8, 1872 (Sec. 3964 U. S. Compiled Statutes 1901), which authorized and empowered every railroad operated by steam, as Complainant's said railroads were then, have been ever since, and are now, to carry freight, passengers, troops, Government supplies, mails, and property on their way from one State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination, and which Acts were enacted under the powers vested in Congress to establish post roads and to regulate commerce among the several States, and were designed to remove trammels upon transportation between different States which had previously existed and to prevent such trammels in the future and were intended among other objects and purposes to reach trammels interposed by State enactments.

The Complainant further states that under the Act of Congress entitled "An Act to aid the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," approved July 24, 1866, (Sects. 5263-5269, inclusive, U. S. Compiled Statutes, 1901), and the amendments thereto, the restrictions and obligations of which Act Complainant has heretofore duly accepted in writing and filed the same with the Postmaster General in accordance with the provisions thereof, and under its charter as amended it is, and has been, since a date long prior to the institution of the Defendant Western Union Telegraph Company's said condemnation proceedings, authorized and empowered in accordance with the laws of the State of Kentucky and other States, including the State of Mississippi, to own, construct, control, operate, and maintain telegraph and telephone lines over, and along its railroad right of way not only for the conduct of its own railroad business, but commercially as a common carrier of messages, news, intelligence, and information for the public at large, and the receipt and delivery thereof, for just and reasonable compensation or hire in all of said States, as provided by the laws thereof, and by virtue of the last mentioned Act it has the right and is duly authorized and empowered to construct, maintain, and operate lines of telegraph through and over any portion of the

28 public domain of the United States, and with their consent along any of the military or post roads of the United States (including its own) which have been or may hereafter be declared such by Act of Congress, and over, under, or across the navigable

streams or waters of the United States, provided that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads.

The Complainant further states that the statutes of Mississippi are in contravention of Sub-Section 3, Section 8, Article 1 of the Constitution of the United States granting complete and exclusive power to Congress to regulate commerce among the several States, and the operation of said statutes lays a burden upon such commerce and the instrumentalities thereof such as Complainant's said railroads in the State of Mississippi and other States connected with each other so as to form continuous lines for the transportation of passengers, troops, Government supplies, mail, freight, and property on their way from one State to another, owned, used, operated, and maintained by Complainant, on, along, and over, the right of way of its said railroads employed in such commerce, and said statutes amount to and operate as a regulation of commerce among the several States, and materially and substantially trammel, obstruct, and interfere with such commerce, and are in conflict with the provisions of the Acts of Congress approved June 15, 1866, July 24, 1866, and June 8, 1872, hereinabove referred to, and are, therefore, unconstitutional and void.

Prayer.

To the end, therefore, that Complainant may have the relief which it can only obtain in a Court of Equity, and that the Defendant may answer the premises, but not upon oath or affirmation, an answer under oath being here expressly waived by the Complainant, the Complainant now prays the court that it will make an order directing that service of process may be had upon the Defendant, the Western Union Telegraph Company, by serving the

same upon any of its agents, conducting any portion of its business within the Southern Division of the Southern District of the State of Mississippi, and that process, in due form of law, according to the rules and practice of this Honorable Court, may issue against the said Western Union Telegraph Company, requiring it to appear and plead to the several allegations of this bill of complaint, within the time prescribed by the rules of equity in Federal Courts.

May it please the Court to further grant to Complainant a restraining order against the Defendant, the Western Union Telegraph Company restraining and enjoining it, from entering or erecting its poles, wires or other fixtures upon any portion of Complainant's said right of way, hereinabove described as having been condemned to its use by the Western Union Telegraph Company, and from attaching its poles or other structures to Complainant's bridges or any of them, until a motion by Complainant for an injunction pendente lite, against the use of any portion of said right of way or bridges by said Western Union Telegraph Company, can be heard and determined.

Complainant further prays that your Honor will be pleased to grant to it an injunction restraining the said Western Union Telegraph Company, during the pendency of this suit, from entering upon or using, otherwise than under an existing contract between Complainant and Defendant, any portion of Complainant's said right of way or bridges hereinabove described, for the purpose of erecting, continuing, or maintaining its telegraph poles, wires, and other fixtures, and from attaching its poles, wires, or other parts of its line, to Complainant's bridges, or any of them, until this cause is finally heard and determined.

Complainant further prays that at the hearing of this cause your Honor will be pleased to decree that the said several proceedings, for the condemnation, by the Western Union Telegraph Company, of parts of the right of way of Complainant, for the erection, by the said Western Union Telegraph Company, of its posts, wires, and appliances, and of the right to attach its poles, wires, or other parts of its line to Complainant's bridges, or any of them, may be held to be null and void as violative of the Fourteenth

Amendment to the Constitution of the United States, as well as for the other reasons assigned in the bill of complaint, and that this Honorable Court will be pleased to decree said several condemnation proceedings, and the several judgments rendered therein, to be void and of no effect, and that it will permanently enjoin the said Western Union Telegraph Company from entering upon, taking possession of, or erecting any of its wires, or other appliances upon complainant's said right of way, and from attaching to Complainant's bridges, or to any of them, the said Western Union Telegraph Company's poles, wires, or other parts of its said telegraph line, after the termination, by notice or otherwise, of the contract under which it now occupies said right of way with its telegraph line.

Complainant further prays that your Honor will grant to it such other and further relief as it may be entitled to in the premises.

(Signed)

(Signed)

GREGORY L. SMITH,

HENRY L. STONE,

Solicitors for Complainant.

STATE OF KENTUCKY,
County of Jefferson:

Personally appeared before me, M. H. Smith, who being sworn deposes and says that he is the President of the Louisville & Nashville Railroad Company, and as such is an officer authorized to make this affidavit upon its behalf, and that the statements contained in the foregoing bill of complaint are true.

M. H. SMITH.

Subscribed and sworn to before me this the 28th day of March 1912.

[SEAL.]

G. W. B. OLMSTEAD,
Notary Public, Jefferson County, Ky.

EXHIBIT "A."

THE STATE OF MISSISSIPPI,
Harrison County:

No. —.

In the Matter of THE WESTERN UNION TELEGRAPH COMPANY.

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, THE NEW
Orleans, Mobile & Texas Railroad Company, as Reorganized; The
Farmers Loan & Trust Company.

Petition for Condemnation.

To the clerk of the circuit court of said county:—

Your petitioner, the Western Union Telegraph Company, a corporation duly organized under the laws of the State of New York, would show that it was chartered and organized for the purpose and object of owning, using, operating and maintaining lines for electric telegraphing and the transmission by wire of telegraph messages, news and information extending through the States of New York into and through other States, including the State of Mississippi. That it is now engaged in the business of telegraphing and transmitting messages, news and information between various points in the State of Mississippi, and from points inside the State of Mississippi, to points without said State, owning and operating lines for telegraphing in said States, and is now actually engaged by virtue of its charter rights, in carrying on in the State of Mississippi the business of telegraphing and the transmission by wire of telegrams, messages, news and information.

It is the desire and intention of petitioner to construct, and maintain and operate for the purposes aforesaid, a line of poles 32 with cross-arms and wires thereon, within the States of Mississippi, and in and through the County of Harrison along the right of way of the Louisville & Nashville Railroad, which is the lessee of and operating said Railroad by virtue of a lease from the New Orleans, Mobile & Texas Railroad Company, as re-organized, which is a corporation of the State of Alabama, domiciled, as petitioner is informed and believes, at Mobile, in said State; from a point on the said right of way on the line dividing the Counties of Harrison and Jackson, which said point is located in the middle of the Bay of Biloxi, and on the bridge of the defendant railroad company spanning said Bay of Biloxi on the east, and thence extending westwardly through the County of Harrison to the dividing line between said County and Hancock County on the West, which is a point in the middle of the Bay of St. Louis and on the bridge of the defendant Railroad Company spanning said Bay of St. Louis, being a distance of thirty miles more or less, and which said route is shown and delineated on a map or blue print hereto annexed marked Exhibit

"A" and prayed to be made and taken as a part hereof. Said right of way being 100 feet wide, and constituting with those portions of the bridges over the Bay of Biloxi and over the Bay of St. Louis, a continuous strip of track about thirty miles long, extending from the Jackson County line on the east to the Hancock County line on the west, and being the right of way over which the main line of said defendants between New Orleans and Mobile is now constructed and being operated. And it is further the desire and intention of petitioners to condemn the right to attach poles, cross-arms and wires above set forth, to such portions of the bridges above mentioned as lie within said Harrison County in such convenient and proper way, and by such proper and prudent means as will in no wise endanger or impair said bridges, and in no wise hamper, impede, obstruct, or interfere with the use thereof by said defendants, and others who may be authorized to use same.

The said line of poles, cross arms and wires to be constructed, and for which this condemnation is sought, being a new line.

33 That it is the purpose of your petitioners to erect one line of poles with cross arms and wires along and upon said right of way and bridges of said defendants and in such manner and at such a distance from the tracks of said defendants as in no way to interfere with the operation of the trains of said defendants, or with any proper or legitimate use thereof by defendants, or the use by any other existing telephone or telegraph companies, and so as not to be dangerous to persons or property.

Your petitioner further states that it does not seek to acquire the fee to any land or bridges included in the right of way of said defendants, or the right to use same for any other purpose than to erect poles with cross arms thereon and string wires for use in telegraphing as aforesaid, and petitioner proposes to maintain and repair the same as may from time to time be necessary, and to erect and maintain only one line of poles with cross arms thereon for said purpose. Said poles not to be less than thirty feet long and not less than one foot in diameter at the base, and to be set in the ground to a depth of not less than five feet in such a manner as to hold firmly in position, the said poles to be securely and properly braced, and said cross arms to be about eight feet in length extending about four feet on each side of said poles near the top, and all other materials used by your petitioner shall be the best, and the said line to be constructed upon the most approved plan known, or in use in this country.

And your petitioner further stipulates and agrees that if at any time in the future, after the erection of its poles, cross arms and wires, it should become necessary for the said defendant to change the location of its tracks, or construct new tracks, or side tracks, where the same do not now exist, and for such purpose to use and occupy that portion of said right of way on which petitioner's poles are, or may be set, cross arms placed thereon and wires strung, your petitioner will, at its own expense upon reasonable notice from said defendants,

remove said poles, cross arms and wires to such other point, or points, on said defendant's right of way as shall be designated by said defendants.

Your petitioner recognizes fully the dominant right of said defendants in the said right of way and bridges sought to be condemned, and all it seeks in this proceeding to condemn is, an easement over same for the construction, operation, maintenance and repair of its telegraph lines, the said easement to be used now and in the future in such way as not to interfere with the proper and necessary use of said right of way by said defendants for railroad purposes.

Your petitioner would further show that it has from time to time endeavored to agree with the defendants as to the right of way which it desires by this proceeding to condemn, and said defendants, so far as your petitioner is advised and believes, being the sole owners of said right of way, or otherwise interested therein, but your petitioner has failed to reach an agreement with the said defendants, and the said defendants having refused to consent to the use of its right of way by your petitioner, your petitioner would show that by virtue of the laws of the State of Mississippi, it is authorized to condemn property for public use, and to erect its lines along and across the right of way of said defendants, and the right of way sought to be condemned in this proceeding is for public use and is necessary for the proper construction and maintenance of petitioner's line and the conduct of its business for the public use and benefit.

Your petitioner is informed, that the Farmers Loan and Trust Company, which is a corporation of the State of New York, domiciled in the City and State of New York, is the trustee in certain mortgages executed by the other defendants herein, to-wit—The New Orleans, Mobile and Texas Railroad Company, as re-organized, and the Louisville and Nashville Railroad Company, for the purpose of securing certain bonds executed and issued by the said defendant Railroad companies the said mortgages covering all of the property of the said defendants in the State of Mississippi, including its right of way and bridges above mentioned.

Premises considered, petitioner prays that upon the presentation of this application to the Clerk of the Circuit Court of Harrison County, he shall endorse thereon his application of a competent Justice of the Peace of said County to constitute, with a jury, a Special Court of Eminent Domain, and shall fix the 27th day of December, A. D. 1911, as the time, and the Court House of the said County, in the City of Gulfport, as the place in said County for the organization of said Court, and he shall issue a summons directed to the Sheriff of said County, commanding him to summons the defendants, the Louisville and Nashville Railroad Company, and that he shall issue process by publication as required by law as in the case of non-residents for the said defendants, the New Orleans, Mobile and Texas Railroad Company, as re-organized, and the Farmers Loan and Trust Company, and shall also post a copy of said process on the premises and at the door of said Court House in said County, commanding them to appear at the time and place designated, and also a summons to the Justice of the Peace named by him, to also appear at said time and place. And that the Clerk shall proceed as provided by law, to draw from the jury box of the

Circuit Court of said County the names of eighteen jurors to serve as part of said Court, and issue a *Venire Facias* to the Sheriff of said County, commanding him to summon jurors as drawn to appear at the time and place designated, to constitute with said Justice of the Peace, a Special Court of Eminent Domain aforesaid, to proceed and condemn the right of way of said defendants as desired by your petitioner along the right of way of the defendant's railroad.

HARRIS & POTTER,
BOWERS & GRIFFITH,
Attorneys for Petitioner.

36 THE STATE OF MISSISSIPPI,
Harrison County:

Personally appeared before me the undersigned authority in and for said County and State, L. K. McNees, who being by me first duly sworn, deposes and says that he is the Manager of the Western Union Telegraph Company at Gulfport, Mississippi, and that all and singular the facts stated in the foregoing petition are true as therein stated.

L. K. MCNEES.

Sworn to and subscribed before me, this the 24th day of Nov., 1911.

[SEAL.]

S. A. TOMLINSON,
Notary Public.

(Endorsed:) State of Mississippi, Harrison County. Western Union Telegraph Company vs. Louisville & Nashville Railroad Company, et als. Petition for Condemnation. Filed November 24, 1911, A. J. Ramsay, Clerk, By A. J. Ramsay, Jr., D. C. Harris & Potter, Bowers & Griffith, for Petitioners.

Summons and *venire facias* issued this Nov. 24, 1911.

Summons by publication issued to defendants, returnable before H. D. Moore, J. P., on Dec. 27th, 1911, published in *Gulfport Daily Herald*, and true copies of summons by publication mailed in Gulfport, Miss., at post office, Nov. 24th, 1911, postage prepaid, addressed to defendants as follows

37 Farmers Loan & Trust Company, New York City, New York, and New Orleans, Mobile & Texas Railroad Company, Mobile, Ala.

A. J. RAMSAY, *Clerk*,
By A. J. RAMSAY, JR., D. C.

STATE OF MISSISSIPPI,
Harrison County:

I, A. J. Ramsay, Clerk of the Circuit Court of said County and State, hereby certify that the foregoing pages contain a true, correct and complete transcript of the petition for condemnation, filed on November 24th, 1911, in the case of the Western Union Telegraph Company vs. Louisville and Nashville Railroad Company, et als., to

gether with the endorsements thereon, as the same appears and remains of record and on file in the archives of my office.

Given under my hand and official seal of said Circuit Court hereto affixed, at office in Gulfport, Miss., this the 13th day of December, 1911.

Clerk Circuit Court of Harrison Co.,
By *Deputy Clerk.*

EXHIBIT "B."

THE STATE OF MISSISSIPPI,
Jackson County:

No. —.

In the Matter of

THE WESTERN UNION TELEGRAPH COMPANY
vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, THE NEW Orleans, Mobile and Texas Railroad Company, as Re-organized; The Farmers Loan and Trust Company.

Petition for Condemnation.

To the Clerk of the Circuit Court of said County:

Your petitioner, the Western Union Telegraph Company, a corporation duly organized under the laws of the State of New York, would show that it was chartered and organized for the purpose and object of owning, and using, operating and maintaining lines for electric telegraphing and the transmission by wire of telegraph messages, news and information extending through the State of New York into and through other states, including the State of Mississippi. That it is now engaged in the business of telegraphing and transmitting messages, news and information between various points in the State of Mississippi, and from points inside of the State of Mississippi, to points without said State, owning and operating lines for telegraphing in said States, and is now actually engaged by virtue of its charter rights, in carrying on in the State of Mississippi the business of telegraphing and the transmission by wire of telegrams, messages, news and information.

It is the desire and intention of petitioner to construct, maintain and operate for the purposes aforesaid, a line of poles with cross arms and wires thereon, within the state of Mississippi, and in and through the county of Jackson along the right of way of the 39 Louisville and Nashville Railroad, which is the lessee of and operating said railroad by virtue of a lease from the New Orleans, Mobile and Texas Railroad Company, as re-organized,

which is a corporation of the State of —, domiciled, as petitioner is informed and believes, at —, in said state; from a point on the right of way of said railroad company on the dividing line between the states of Alabama and Mississippi near Pecan station on the east, thence extending through the county of Jackson to the dividing line separating the counties of Jackson and Harrison in the state of Mississippi, which said dividing line is in the middle of the Bay of Biloxi and is a point on the bridge of the said Louisville and Nashville Railroad Company which spans said Bay of Biloxi between Ocean Springs on the east and Biloxi on the west, being a distance of twenty-two miles more or less, and which said route is shown and delineated on a map or blue print hereto annexed marked Exhibit "A" and prayed to be made and taken as a part hereof. Said right of way being 100 feet wide, and constituting, together with that portion of the bridge over the Bay of Biloxi lying in Jackson county and the bridges over the east and west Pascagoula River, the right of way of the said railroad company lying in Jackson County, Miss., and extending from the Alabama line on the east to the Harrison county line on the west, being the right of way over which the main line of said defendant between New Orleans and Mobile is now constructed and operated. And it is further the desire and intention of petitioners to condemn the right to attach poles, cross arms and wires as above set forth, to such portions of the bridges above mentioned as lie within said Jackson county in such convenient and proper way, and by such proper and prudent means as will in no wise endanger or impair said bridges, and in no wise hamper, impede, obstruct or interfere with the use thereof by said defendants, and others who may be authorized to use same.

The said line of poles, cross arms and wires to be constructed, and for which this condemnation is sought, being a new line.

That it is the purpose of your petitioners to erect one line 40 of poles with cross arms and wires along and upon said right of way and bridges of said defendants and in such manner and at such a distance from the tracks of said defendants as in no way to interfere with the operation of the trains of said defendants, or with any proper or legitimate use thereof by defendants, or the use by any other existing telephone or telegraph Companies, and so as not to be dangerous to persons or property.

Your petitioner further states that it does not seek to acquire the fee to any land or bridges included in the right of way of said defendants, or the right to use same for any other purpose than to erect poles with cross arms thereon and string wires for use in telegraphing as aforesaid, and petitioner proposes to maintain and repair the same as may from time to time be necessary, and to erect and maintain only one line of poles with cross arms thereon for said purpose. Said poles not to be less than thirty feet long and not less than one foot in diameter at the base, and to be set in the ground to a depth of not less than five feet in such a manner as to hold firmly in position, the said poles to be securely and properly braced, and said cross arms to be about eight feet in length extending about four feet on each side of said poles near the top, and all other ma-

terials used by your petitioner shall be the best, and the said line to be constructed upon the most approved plan known, or in use in this country.

And your petitioner further stipulates and agrees that if at any time in the future, after the erection of its poles, cross arms and wires, it should become necessary for the said defendant to change the location of its tracks, or construct new tracks, or side tracks, where the same do not now exist, and for such purpose to use and occupy that portion of said right of way on which petitioner's poles are, or may be set, cross arms placed thereon and wires strung, your petitioner will, at its own expense, upon reasonable notice from said defendants, remove said poles, cross arms and wires to such other point or points, on said defendants' right of way as shall be designated by said defendants.

41 Your petitioner recognizes fully the dominant right of said defendants in the said right of way and bridges sought to be condemned, and all it seeks in this proceeding to condemn is an easement over the same for the construction, operation, maintenance and repair of its telegraph lines, the said easement to be used now and in the future in such way as not to interfere with the proper and necessary use of said right of way by said defendants for railroad purposes.

Your petitioner would further show that it has from time to time endeavored to agree with the defendants as to the right of way which it desires by this proceeding to condemn, and said defendants so far as your petitioner is advised and believes, being the sole owners of said right of way, or otherwise interested therein, but your petitioner has failed to reach an agreement with the said defendants, and the said defendants having refused to consent to the use of its right of way by your petitioner, your petitioner would show that by virtue of laws of the State of Mississippi, it is authorized to condemn property for public use, and to erect its lines along and across the right of way of said defendants, and the right of way sought to be condemned in the proceedings is for public use and is necessary for the proper construction and maintenance of petitioner's line and the conduct of its business for the public use and benefit.

Your petitioner is informed that the Farmers Loan & Trust Co., which is a corporation of the State of New York, domiciled in the City and State of New York, is the trustee in certain mortgages executed by the other defendants herein, to-wit, the New Orleans, Mobile & Texas Railroad Co., as re-organized, and the Louisville & Nashville Railroad Co., for the purpose of securing certain bonds executed and issued by the said defendants' railroad companies the said mortgages covering all of the property of the said defendants in the state of Mississippi, including its right of way and bridges above mentioned.

Premises considered, petitioner prays that upon the presentation of this application to the Clerk of the Circuit Court of Jackson county, he shall endorse thereon his appointment of a competent

42 Justice of the Peace of said County to constitute with a jury a special court of eminent domain, and shall fix the 10th day of January, 1912, as the time, and the Court House of the

said county, in the Town of Pascagoula, sometimes called Scranton, as the place in said county for the organization of said court, and he shall issue a summons directed to the sheriff of said county, commanding him to summons the defendants, the Louisville & Nashville Railroad Co., and that he shall issue process by publication as required by law in the case of non-residents for the said defendant the New Orleans, Mobile & Texas Railroad Co., as re-organized, and the Farmers Loan & Trust Co., and shall also post a copy of said process on the premises and at the door of said court house in said county, commanding them to appear at the time and place designated, and also a summons to the Justice of the Peace named herein, him, to also appear at said time and place. And that the Clerk shall proceed as provided by law, to draw from the jury box of the circuit court of said county the names of 18 jurors to serve as part of said court, and issue a *venire facias* to the sheriff of said county, commanding him to summons jurors as drawn to appear at the time and place designated, to constitute with said Justice of the Peace, a special court of eminent domain aforesaid, to proceed and condemn the right of way of said defendants as desired by your petitioner along the right of way of the defendants' railroad.

HARRIS & POTTER,
BOWERS & GRIFFITH,
Attorneys for Petitioner.

THE STATE OF MISSISSIPPI,
Harrison County:

Personally appeared before me the undersigned authority in and for said county and state, L. K. McNees, who being by me first duly sworn deposes and says that he is the Manager of the Western Union Telegraph Company at Gulfport, Miss., and that all and singular the facts stated in the foregoing petition are true as therein stated.

L. K. McNEES.

Sworn to and subscribed before me this the 2nd day of Nov., 19-

F. H. TOMLINSON,
Notary Public.

EXHIBIT "C."

THE STATE OF MISSISSIPPI,
Hancock County:

No. —.

In the Matter of THE WESTERN UNION TELEGRAPH COMPANY
vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, THE NEW
Orleans, Mobile and Texas Railroad Company, as Re-organized;
The Farmers Loan and Trust Company.

Petition for Condemnation.

To the Clerk of the Circuit Court of said County:

Your petitioner, the Western Union Telegraph Co., a corporation duly organized under the laws of the State of New York, would show that it was chartered and organized for the purpose and object of owning, using, operating and maintaining lines for electric telegraphing and the transmission by wire of telegraph messages, news and information extending through the state of New York into and through other states, including the state of Mississippi. That it is now engaged in the business of telegraphing and transmitting messages, news and information between various points in the State of Mississippi, and from points inside of the State of Mississippi to points without said state, owning and operating lines for telegraphing in said states, and is now actually engaged by virtue of its charter rights, in carrying on in the State of Mississippi the business of telegraphing and the transmission by wire of telegrams, messages, news and information.

It is the desire and intention of petitioner to construct, maintain and operate for the purposes aforesaid, a line of poles with cross arms and wires thereon, within the state of Mississippi, and in and through the county of Hancock along the right of way of the Louisville & Nashville Railroad, which is the lessee of and operating said railroad by virtue of a lease from the New Orleans.

Mobile & Texas R. R. Co., as re-organized, which is a corporation of the state of Alabama, domiciled, as petitioner is informed and believes, at Mobile, in said state; from a point on said right of way on the dividing line between the counties of Hancock and Harrison on the bridge crossing the Bay of St. Louis on the east, and thence extending through the county of Hancock to the thread of the stream of East Pearl River, which is the Western boundary of the State of Mississippi, separating same from the State of Louisiana, being a distance of 17 miles more or less, and which said route is shown and delineated on a map or blue print hereto annexed marked Exhibit "A" and prayed to be made and taken as a part hereof. The said right of way being about 100 feet wide and constituting, together with that portion of the bridge over the Bay of St. Louis,

lying in Hancock county and that portion of East Pearl River lying in the State of Mississippi, one continuous and contiguous strip or body of land and tract, extending from the Harrison County line on the east to the Louisiana line on the west, and being the right of way over which the main line of said defendants, between New Orleans and Mobile is now constructed and being operated. And it is further the desire and intention of petitioners to condemn the right to attach poles, cross arms and wires as above set forth, to such portions of the bridges above mentioned as lie within said Hancock County in such convenient and proper way, and by such proper and prudent means as will in no wise endanger or impair said bridges and in no wise hamper, impede, obstruct or interfere with the use thereof by said defendants and others who may be authorized to use same.

The said line of poles, cross arms and wires to be constructed, and for which this condemnation is sought, being a new line.

That it is the purpose of your petitioner to erect one line of poles with cross arms and wires along and upon said right of way and bridges of said defendants and in such manner and at such a distance from the tracks of said defendants as in no way to interfere with the operation of the trains of said defendants, or with

any proper or legitimate use thereof by defendants, or the use
45 by any other existing telephone or telegraph companies, and
so as not to be dangerous to persons or property.

Your petitioner further states that it does not seek to acquire the fee to any land or bridges included in the right of way of said defendants, or the right to use same for any other purpose than to erect poles with cross arms thereon and string wires for use in telegraphing as aforesaid, and petitioner proposes to maintain and repair the same as may from time to time be necessary and to erect and maintain only one line of poles with cross arms thereon for said purpose. Said poles not to be less than thirty feet long and not less than one foot in diameter at the base, and to be set in the ground to a depth of not less than five feet in such a manner as to hold firmly in position, the said poles to be securely and properly braced, and said cross arms to be about eight feet in length extending about four feet on each side of said poles near the top, and all other materials used by your petitioner shall be the best, and the said line to be constructed upon the most approved plan known, or in use in this country.

And your petitioner further stipulates and agrees that if, at any time in the future, after the erection of its poles, cross arms and wires, it should become necessary for the said defendant to change the location of its tracks, or construct new tracks, or side tracks, where the same do not now exist, and for such purpose to use and occupy that portion of said right of way on which petitioner's poles are, or may be set, cross arms placed thereon and wires strung, your petitioner will, at its own expense, upon reasonable notice from said defendants, remove said poles, cross arms and wires to such other point, or points, on said defendants' right of way as shall be designated by said defendants.

Your petitioner recognizes fully the dominant right of said defendants in the said right of way and bridges sought to be con-

demned, and all it seeks in this proceeding to condemn is an easement over same for the construction, operation, maintenance and repair of its telegraph lines, the said easement to be used 46 now and in the future in such way as not to interfere with the proper and necessary use of said right of way by said defendants for railroad purposes.

Your petitioner would further show that it has from time to time endeavored to agree with the defendants as to the right of way which it desires by this proceeding to condemn, and said defendants, so far as your petitioner is advised and believes, being the sole owners of said right of way, or otherwise interested therein, but your petitioner has failed to reach an agreement with the said defendants, and the said defendants having refused to consent to the use of its right of way by your petitioner, your petitioner would show that by virtue of the laws of the State of Mississippi, it is authorized to condemn property for public use, and to erect its lines along and across the right of way of said defendants, and the right of way sought to be condemned in this proceeding is for public use and is necessary for the proper construction and maintenance of petitioner's line and the conduct of its business for the public use and benefit.

Your petitioner is informed that the Farmers Loan & Trust Co., which is a corporation of the State of New York, domiciled in the City and State of New York, is the trustee in certain mortgages executed by the other defendants herein, to-wit: the New Orleans, Mobile and Texas R. R. Co., as re-organized, and the Louisville & Nashville R. R. Co., for the purpose of securing certain bonds executed and issued by the said defendant Railroad Companies the said mortgages covering all of the property of the said defendants in the State of Mississippi, including its right of way and bridges above mentioned.

Premises considered, petitioner prays that upon the presentation of this application to the Clerk of the Circuit Court of Hancock County, he shall endorse thereon his appointment of a competent Justice of the Peace of said county to constitute, with a jury, a special court of eminent domain, and shall fix the 8th day of Jan-

uary, A. D. 1912, as the time, and the Court House of the said 47 County, in the City of Bay St. Louis, as the place, in said county for the organization of said court, and he shall issue a summons directed to the Sheriff of said County, commanding him to summons the defendants, the Louisville & Nashville R. R. Co., and that he shall issue process by publication as required by law as in the case of non-residents for the said defendants, the New Orleans, Mobile & Texas R. R. Co., as re-organized, and the Farmers Loan & Trust Co., and shall also post a copy of said process on the premises and at the door of said court house in said county, commanding them to appear at the time and place designated and also a summons to the Justice of the Peace named by him, to also appear at said time and place. And that the Clerk shall proceed as provided by law, to draw from the jury box of the Circuit Court of said County the names of eighteen jurors to serve as part of said court, and issue a venire facias to the Sheriff of said county, commanding him to sum-

mons jurors as drawn to appear at the time and place designated, to constitute, with said Justice of the Peace, a Special Court of eminent domain aforesaid, to proceed and condemn the right of way of said defendants as desired by your petitioner along the right of way of the defendants' railroad.

HARRIS & POTTER,
BOWERS & GRIFFITH,
Attorneys for Petitioner.

48 THE STATE OF MISSISSIPPI,
Harrison County:

Personally appeared before me the undersigned authority in and for the said County and State, L. K. McNees, who being by me first duly sworn, deposes and says that he is the Manager of the Western Union Telegraph Co. at Gulfport, Miss., and that all and singular the facts stated in the foregoing petition are true as therein stated.

L. K. MCNEES.

Sworn to and subscribed before me this the 24th day of Nov., 1911.

[SEAL.]

S. A. TOMLINSON,
Notary Public.

THE STATE OF MISSISSIPPI,
Hancock County:

I, W. W. Stockstill, Clerk of the Circuit Court of the County and State aforesaid, hereby certify that the foregoing six pages contain a true and correct copy of the petition of the Western Union Telegraph Company for condemnation against the Louisville & Nashville Railroad Company, et al., now on file in my office.

Given under my hand and official seal, this the 12th day of December, A. D. 1911.

[SEAL.]

W. W. STOCKSTILL,
Circuit Clerk.

49

EXHIBIT "D."

STATE OF MISSISSIPPI,
Jackson County:

No. —.

In the Matter of THE WESTERN UNION TELEGRAPH COMPANY
vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, THE NEW Orleans, Mobile and Texas Railroad Company, as Re-organized; The Farmers Loan and Trust Company.

Petition for Condemnation.

To the Clerk of the Circuit Court of said County:

Your petitioner, the Western Union Telegraph Company, a corporation duly organized under the laws of the State of New York,

would show that it was chartered and organized for the purpose and object of owning, using, operating and maintaining lines for electric telegraphing and the transmission by wire of telegraph messages, news and information extending through the State of New York into and through other States, including the State of Mississippi. That it is now engaged in the business of telegraphing and transmitting messages, news and information between various points in the State of Mississippi, and from points inside of the State of Mississippi, to points without said State, owning and operating lines for telegraphing in said states, and is now actually engaged by virtue of its charter rights, in carrying on in the State of Mississippi the business of telegraphing and the transmission by wire of telegrams, messages, news and information.

It is the desire and intention of petitioner to construct, maintain and operate for the purpose aforesaid, a line of poles with cross arms and wires thereon, within the state of Mississippi, and in and through the County of Jackson along the right of way of the Louisville & Nashville Railroad, from a point on the right of way of said railroad company on the dividing line between the states of Alabama and Mississippi near Pecan Station on the east, thence extending through the County of Jackson to the dividing line separating the counties of Jackson and Harrison in the State of Mississippi, being a distance of twenty-two miles more or less, and which said route is shown and delineated on a map or blue print hereto annexed marked Exhibit "A" and prayed to be made and taken as a part hereof. Said right of way being 100 feet wide, and constituting the right of way of said railroad company, lying in Jackson County, Mississippi, and extending from the Alabama line on the east to the Harrison County line on the west, being the right of way over which the main line of said defendant between New Orleans and Mobile is now constructed and being operated. It is not the desire or intention of petitioner to condemn the use of any of the bridges of the Louisville & Nashville R. R. Co., lying and being in Jackson County, Miss., and petitioner expressly disclaims and abandons any intention or purpose of condemning or using any of said bridges.

The said line of poles, cross arms and wires to be constructed, and for which this condemnation is sought, being a new line. That it is the purpose of your petitioners to erect one line of poles with cross arms and wires along and upon said right of way of said defendants and in such manner and at such a distance from the tracks of said defendants as in no way to interfere with the operation of the trains of said defendants, or with any proper or legitimate use thereof by defendants, or the use by any other existing telephone or telegraph companies, and so as not to be dangerous to persons or property.

Your petitioner further states that it does not seek to acquire the fee to any land included in the right of way of said defendants, or the right to use same for any other purpose than to erect poles with cross arms thereon and string wires for use in telegraphing as aforesaid, and petitioner proposes to maintain and repair the same as may from time to time be necessary and to erect and maintain

only one line of poles with cross arms thereon for said purpose. Said poles not to be less than thirty feet long not less than one foot in diameter at the base, and to be set in the ground to a depth of not less than five feet in such a manner as to hold firmly in position, the said poles to be securely and properly braced, and said cross arms to be about eight feet in length extending about four feet on each side of said poles near the top, and all other materials used by your petitioner shall be the best, and the said line to be constructed upon the most approved plan known, or in use in this country.

51 And your petitioner further stipulates and agrees that if at any time in the future, after the erection of its poles, cross arms and wires, it should become necessary for the said defendant to change the location of its tracks, or construct new tracks, or side tracks, where the same do not now exist, or any other legitimate railroad use, and for such purpose to use and occupy that portion of said right of way on which petitioner's poles are, or may be, set, cross arms placed thereon and wires strung, your petitioner will, at its own expense, upon reasonable notice from said defendants, remove said poles, cross arms and wires to such other point, or points, on said defendants' right of way as shall be designated by said defendants. And if at any time said railroad company shall require in the manner and for the purposes aforesaid, its entire right of way at any point where the petitioner's line may be constructed on its right of way, the petitioner will at such point or points remove its line entirely off of said right of way at its cost and expense, upon being given reasonable notice thereof in writing.

Your petitioner recognizes fully the dominant right of said defendants in the said right of way sought to be condemned, and all it seeks in this proceeding to condemn is an easement over same for the construction, operation, maintenance and repair of its line, the said easement to be used now and in the future in such way as not to interfere with the proper and necessary use of said right of way by said defendants for railroad purposes.

Your petitioner would further show that it has, from time to time, endeavored to agree with the defendants as to the right of way which it desires by this proceeding to condemn, and said defendants, so far as your petitioner is advised and believes, being the sole owners of said right of way, or otherwise interested therein, but your petitioner has failed to reach an agreement with the said defendants, and the said defendants having refused to consent to the use of its right of way by your petitioner, your petitioner would show that, by virtue of the laws of the State of Mississippi, it is authorized to condemn property for public use, and to erect its lines along and across the right of way of said defendants, and the right of way sought to be condemned in this proceeding is for public use and is necessary for the proper construction and maintenance of petitioner's line and the conduct of its business for the public use and benefit.

Your petitioner is informed that the Farmers Loan & Trust Co., which is a corporation of the State of New York, domiciled in the

City and State of New York, is the trustee in certain mortgages executed by the other defendants herein, to-wit, the Louisville and Nashville R. R. Co., for the purpose of securing certain bonds executed and issued by the defendant railroad companies, the said mortgages covering all of the property of the said defendants in the State of Mississippi, including its right of way and bridges above mentioned.

Premises considered, petitioner prays that, upon the presentation of this application to the Clerk of the Circuit Court of Jackson County, he shall endorse thereon his appointment of a competent Justice of the Peace of said County to constitute, with a jury, a special court of eminent domain, and shall fix the 10th day of January, 1912, as the time, and the Court House of the said county, in the town of Pascagoula, sometimes called Scranton, as the place in said county for the organization of said court, and he shall issue a summons directed to the sheriff of said county, commanding him to summon the defendants, the Louisville and Nashville R. R. Co., and he shall issue process by publication as required by law in the case of non-residents for the said defendant, the Farmers Loan & Trust Company, and shall also post a copy of said process on the premises and at the door of said court house in said county, commanding them to appear at the time and place designated, and also a summons to the Justice of the Peace named by him, to also appear at said time and place. And that the Clerk shall pro-

53 ceed as provided by law, to draw from the jury box of the circuit court of said county the names of eighteen jurors to serve as part of said court, and issue a venire facias to the sheriff of said county, commanding him to summons jurors as drawn to appear at the time and place designated, to constitute, with said Justice of the Peace, a Special Court of eminent domain aforesaid, to proceed and condemn the right of way of said defendants as desired by your petitioner along the right of way of the defendants' railroad.

HARRIS AND POTTER,
BOWERS AND GRIFFITH,
Attorneys for Petitioner.

THE STATE OF MISSISSIPPI,
Harrison County:

Personally appeared before me the undersigned authority in and for said county and state, L. K. McNees, who being by me first duly sworn deposes and says that he is the manager of the Western Union Telegraph Company at Gulfport, Mississippi, and that all and singular the facts stated in the foregoing petition are true as therein stated.

L. K. MCNEES.

Sworn to and subscribed before me this the 20th day of November, 1911.

F. H. TOMLINSON,
Notary Public.

Indorsed on the back of the foregoing paper is the following: "No. 117, U. S. District Court for Southern Division of Southern District of Mississippi. L. & N. R. R. Co., vs. Western Union Telegraph Co. Original Bill. Filed April 27, 1912; L. B. Moseley, Clerk, by Roy Chinn, Deputy, Gregory L. Smith, H. L. Stone for Complainant."

54 UNITED STATES OF AMERICA:

In the District Court for the Southern Division of the Southern District of Mississippi.

LOUISVILLE-NASHVILLE RAILROAD CO.

vs.

WESTERN UNION TELEGRAPH COMPANY.

Special Demurrer.

Comes the defendant, the Western Union Telegraph Company, for the special purpose and no other, until the question herein raised is decided of objecting to the jurisdiction of this court, by protestation, and confessing or acknowledging all or any part of the matters or things in said bill of complaint contained to be true in such manner and form as the same are herein set forth and alleged, demurs to the said bill and for cause of demurrer shows:

1. Because it appears from the face of the bill that neither the plaintiff nor the defendant is a citizen, resident or inhabitant of the southern division of the southern district of Mississippi.

2. Because Section 919 of the code of the State of Mississippi, set out and relied upon in said bill as conferring jurisdiction upon this court, does not confer jurisdiction and could not. The jurisdiction of this court being determined by the constitution and laws of the United States.

3. Because the said section 919 applies only *the* suits brought by residents of the State of Mississippi against foreign corporations in the state courts, and was not intended, in any way, to effect the jurisdiction of the Federal courts or suits brought therein.

55 4. For other reasons apparent.

Respectfully submitted,

J. B. HARRIS AND
BOWERS AND GRIFFITH,
Attorneys for the Defendant,
Western Union Tel. Co.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

Indorsed on the back for the foregoing paper, is the following: "No. 117. Louisville and Nashville Railroad Co. vs. The Western Union Telegraph Co. Special Demurrer. Filed June 28th 1912. L. B. Moseley, Clerk. By Roy Chinn, Dep." J. B. Harris and Bowers & Griffith, Att'y- for Defd.

56 UNITED STATES OF AMERICA:

In the District Court of the United States for the Southern Division of the Southern District of Mississippi.

LOUISVILLE & NASHVILLE R. R. CO.

vs.

WESTERN UNION TELEGRAPH CO.

The special demurrer of defendant to the jurisdiction of the court having been set down for hearing by complainant and coming on for hearing by agreement at Kosciusko, Mississippi, on this 9th day of July, A. D. 1912, and the court having heard said demurrer and the argument of counsel for complainant and defendant thereon, and finding that defendant is a corporation inhabitant and resident of the State of New York and that Complainant is a corporation and resident of the State of Kentucky and that the said bill is not a bill to remove clouds from title to lands in the division and district aforesaid and that this court has no jurisdiction over the defendant in this suit, and that defendant is not suable in this case in this district or division but is suable only in the district whereof it is an inhabitant, it is therefore, ordered, adjudged, and decreed that said demurrer be and it is hereby sustained and said bill dismissed at the costs of complainant.

Ordered, adjudged and decreed at Kosciusko, Mississippi, this 9th day of July, A. D. 1912.

(Signed)

H. C. NILES, *Judge*.

July 9th, 1912.

Endorsed on the back of the foregoing paper is the following:—
"Filed July 13th, 1912. L. B. Moseley, Clerk, By Roy Chinn, Deputy Clerk."

57 In the United States District Court for the Southern Division of the Southern District of Mississippi.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

The above named complainant, conceiving itself aggrieved by the decree rendered in the above entitled cause on the 9th day of July, 1912, and filed July 13th, 1912, whereby it was decreed that the said United States District Court was without jurisdiction of said cause, and that the bill of complaint be for that reason dismissed, now prays that this its appeal to the Supreme Court of the United States may be allowed for the review of the decree of the said United States District Court for the Southern Division of the Southern District of Mississippi, and that a citation in due form be issued.

That a certificate be made that the jurisdiction of said District

Court is the only question involved in said appeal, and the only question by said appeal presented for review to the Supreme Court of the United States.

United States. And that the transcript of the record and proceedings and papers upon which said final decree was made, duly authenticated, may be sent to the said United States Supreme Court.

And now, at the time of the filing of this petition for appeal, the said Louisville & Nashville Railroad Company files an assignment of errors, setting up separately and particularly each error asserted and intended to be urged in the said United States Supreme Court, and presents herewith for approval its appeal bond.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY,
By GREGORY L. SMITH,
HENRY L. STONE,
Its Solicitors.

58 Endorsed on the back of the foregoing paper is the following:—"No. 117. L. & N. R. R. Co. vs. Western Union Tel. Co. Filed July 25th, 1912, L. B. Moseley, Clerk, By Roy Chinn, Deputy Clerk."

59 The foregoing petition having been presented and duly considered, it is ordered that the appeal therein prayed be allowed: that the appeal bond presented by the said Louisville & Nashville Railroad Company with its said petition be and is hereby accepted and approved: and that the Clerk of this Court cause a duly authenticated transcript of the record, proceedings and papers upon which the decree appealed from was rendered to be transmitted to the Supreme Court of the United States.

And it is hereby certified that the jurisdiction of said District Court for the Southern Division of the Southern District of Mississippi of said cause was the only question determined by the decree from which the said appeal is prayed, and the only question presented by said appeal to the Supreme Court of the United States for review.

Made this the 26th day of July, 1912.

(Signed)

H. C. NILES.

Signed) H. C. RILEY,
*Judge of the United States District Court for the
Southern Division of the Southern District of Mississippi*

Endorsed on the back of the foregoing paper is the following: "No. 117, L. & N. R. R. Co. v. Western Union Tel. Co. Filed Aug 1st, 1912, L. B. Moseley, Clerk, By Roy Chinn, Dep. Clerk."

60 Supreme Court of the United States, October Term, 19—

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.

vs.
THE WESTERN UNION TELEGRAPH COMPANY, Appellee.

Comes the Louisville & Nashville Railroad Company, the plaintiff in error, by its Counsel, and respectfully represents that it feels itself

aggrieved by the proceedings and decree of the United States District Court for the Southern Division of the Southern District of Mississippi, made on the 9th day of July, 1912, and filed July 13th, 1912, in the above entitled cause, and assigns error thereto as follows:

1. The Court erred in sustaining the demurrer to the bill of complaint, and in decreeing that it had no jurisdiction of said cause and in dismissing the bill of complaint for want of such jurisdiction.

2. The court erred in sustaining the demurrers to the bill of complaint and in decreeing that the bill of complaint by which said cause was commenced is not a bill to remove clouds from title to lands in the Southern Division of the Southern District of Mississippi, and that said court has no jurisdiction over the defendant in said suit and that the bill of complaint be dismissed for want of jurisdiction.

3. The court erred in sustaining the demurrer to the bill of complaint and in decreeing that the bill of complaint by which said cause was commenced is not a bill to remove clouds from title to lands in the Southern Division of the Southern District of Mississippi, and that defendant is not suable in this cause in said district or division, but is suable only in the district whereof it is an inhabitant, and in dismissing the bill of complaint for want of such jurisdiction.

(Signed)
(Signed)

GREGORY L. SMITH,
HENRY L. STONE,
Solicitors for Plaintiff in Error.

Endorsed on the back of the foregoing paper is the following:—
"No. 117 L. & N. R. R. Co. vs. Western Union Tel. Co. Filed
July 25, 1912. L. B. Moseley, Clerk, By Roy Chinn, Dep. Clerk."

62 LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant.

Know all men by these presents, That We, the Louisville & Nashville Railroad Company, as principal, and the National Surety Company, of New York, as surety, are held and firmly bound unto the defendant, the Western Union Telegraph Company, in the sum of one thousand dollars (\$1,000.00), to be paid to the said defendant, for which payment well and truly to be made we bind ourselves jointly and severally, and each of our successors and assigns jointly and severally by these presents.

Sealed with our seals, and dated this the 19th day of July, 1912.

Whereas, the above named complainant, the Louisville & Nashville Railroad Company, hath prosecuted its appeal to the United States Supreme Court to reverse the final decree rendered in the above entitled suit by the District Court of the United States for the Southern Division of the Southern District of Mississippi; Nov. Therefore, the condition of this obligation is, that if the above named Louisville & Nashville Railroad Company shall prosecute its said appeal to effect and answer all costs and damages that may be ad-

judged or awarded against it, if it shall fail to make good its plea, then this obligation to be void; otherwise, in full force.

[SEAL.] LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By W. L. MAPOTHER, *First Vice-President.*

Attested by

M. K. GILBERT,
Assistant Secretary.

[SEAL.] NATIONAL SURETY COMPANY OF NEW YORK,
By A. C. TONSMEIRE, *Res'd't Vice-Pres'd't.*

Attested by

ALEXANDER McKINSTRY.

63 Taken and approved by me this the 26th day of July, 1912.

(Signed)

H. C. NILES,
Judge of the District Court for the Southern District of Mississippi.

Endorsed on the back of the foregoing paper is the following:—
"No. 117. L. & N. R. R. Co. vs. Western Union Tel. Co. Filed July 25th, 1912. L. B. Moseley, Clerk, by Roy Chinn, Dep. Clerk."

64 To the Western Union Telegraph Company, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court at Washington within thirty days from the date hereof, pursuant to an order, allowing the appeal, filed in the Clerk's Office of the United States District Court for the Southern Division of the Southern District of Mississippi, wherein the Louisville & Nashville Railroad Company is appellant and you are appellee, to show cause, if any there be, why the decree made against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry C. Niles, Judge of the United States District Court for the Southern Division of the Southern District of Mississippi, this the 26th day of July, in the year of our Lord nineteen hundred and twelve.

(Signed)

H. C. NILES,
Judge of the United States District Court for the Southern Division of the Southern District of Mississippi.

We hereby acknowledge the receipt of a copy of the foregoing citation, and hereby accept service thereof for the defendant in error, The Western Union Telegraph Company, this the 2nd day of August, 1912.

(Signed)

(Signed)

J. B. HARRIS,
BOWERS & GRIFFITH,
Solicitors for the Defendant in Error,
The Western Union Telegraph Company.

Endorsed on the back of the foregoing paper is the following:--
 "No. 117. L. & N. R. R. Co. vs. Western Union Tel. Co. Filed
 Aug. 1st, 1912, L. B. Moseley, Clerk, by Roy Chinn, Dep. Clerk."

65 In the United States District Court for the Southern Division
 of the Southern District of Mississippi.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

vs.

WESTERN UNION TELEGRAPH COMPANY.

To the Clerk of the United States District Court for the Southern
 Division of the Southern District of Mississippi:

The Appellant, the Louisville & Nashville Railroad Company, desires a transcript of the record in said cause, which is to be sent to the Supreme Court of the United States, pursuant to the appeal taken to said Court by the complainant from the decree of the said District Court sustaining demurrers to the jurisdiction of said Court, and dismissing the bill of complaint, to consist of the following portions of said record:

1. The original bill of complaint filed in said cause, with the exhibits thereto attached.
2. Special demurrers filed by the defendant to the jurisdiction of the court.
3. The decree of the court sustaining the demurrers to the jurisdiction of the court in dismissing the bill of complaint.
4. The petition for an appeal and the allowance thereof.
5. The assignment of error filed with the petition for appeal.
6. The appeal bond filed.
7. The citation of appeal with acknowledgment of service thereof.
8. This praecipe.

(Signed)
 (Signed)

GREGORY L. SMITH,
 HENRY L. STONE,
Solicitors for Complainant.

66 We hereby acknowledge service of a copy of the foregoing
 praecipe this the 2nd day of Aug., 1912.

(Signed)
 (Signed)

J. B. HARRIS,
 BOWERS & GRIFFITH,
Solicitors for Defendant,
Western Union Telegraph Company.

Endorsed on the back of the foregoing paper is the following:--
 "No. 117. L. & N. R. R. Co. vs. Western Union Tel. Co. Filed
 Aug. 1st, 1912. L. B. Moseley, Clerk, by Roy Chinn, Dep. Clerk."

67 United States District Court for the Southern Division of the Southern District of Mississippi.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
WESTERN UNION TELEGRAPH COMPANY.

I, L. B. Moseley, Clerk of the United States District Court for the Southern Division of the Southern District of Mississippi, do hereby certify that the foregoing pages, numbered from 1, to 66, inclusive, contain a full, true and correct transcript of the record and proceedings in the case of Louisville & Nashville Railroad Company, vs. Western Union Telegraph Company, numbered 117 in Equity, as the same appear of record in the office of the Clerk of said court.

Witness my hand and official seal hereunto affixed, this the 20th day of August, A. D. 1912.

[Seal U. S. District Court, Southern District of Mississippi.]

L. B. MOSELEY,
*Clerk of the United States District Court for
the Southern Division of the Southern
District of Mississippi,*
By ROY CHINN, Deputy.

Endorsed on cover: File No. 23,344. S. Mississippi D. C. U. S. Term No. 769. Louisville & Nashville Railroad Company, appellant, vs. The Western Union Telegraph Company. Filed September 3d, 1912. File No. 23,344.

12
Office Supreme Court, U. S.
FILED.

NOV 18 1912
JAMES H. MCKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM 1912

No. ~~200~~ 337

LOUISVILLE & NASHVILLE RAILROAD CO.,

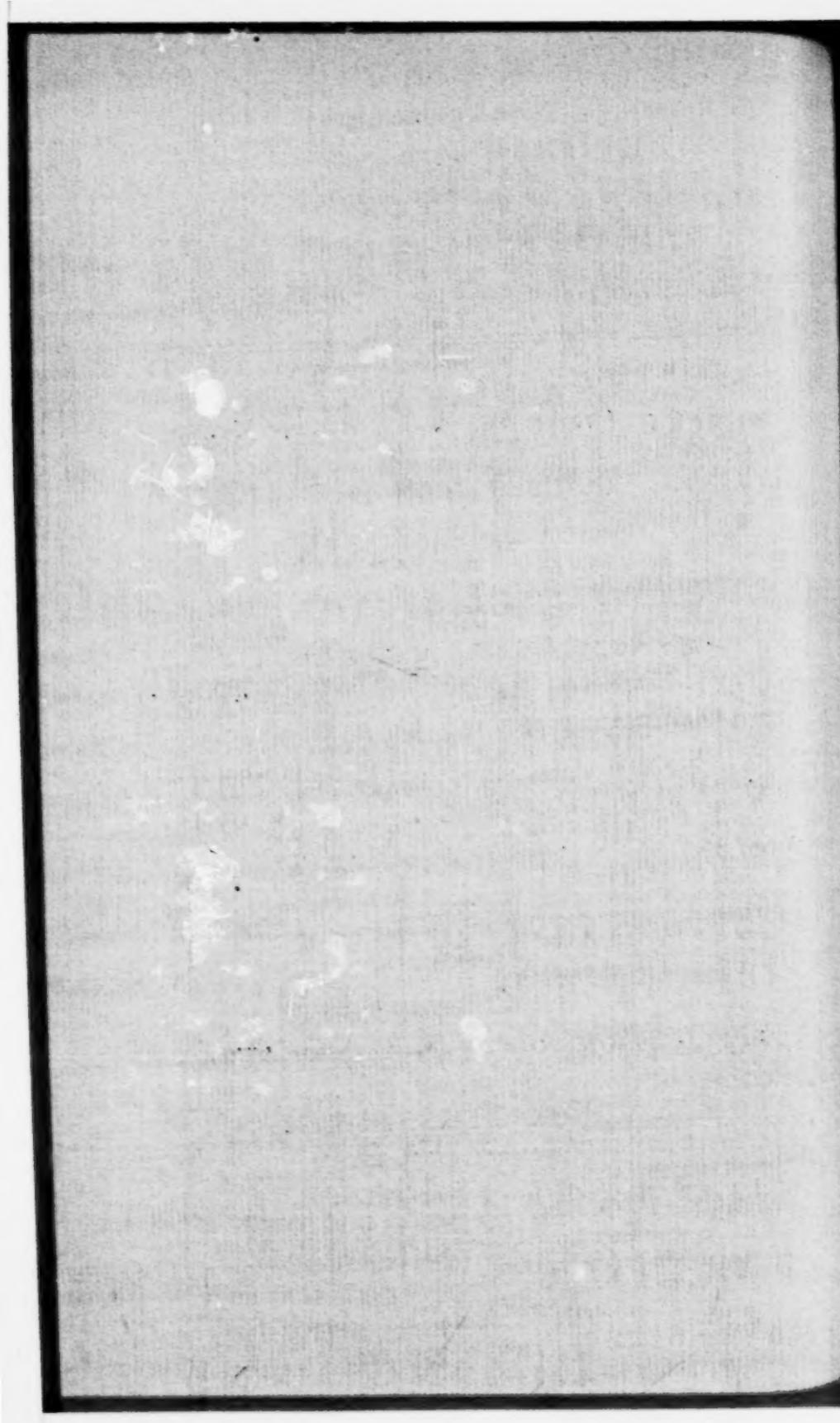
Appellant,

vs.

WESTERN UNION TELEGRAPH COMPANY,

Appellee.

APPLICATION TO ADVANCE THE CAUSE.



Supreme Court of the United States

OCTOBER TERM 1912

No. 769

LOUISVILLE & NASHVILLE RAILROAD CO.,

Appellant,

vs.

WESTERN UNION TELEGRAPH COMPANY,

Appellee.

TO THE HONORABLE, THE JUDGES OF THE SUPREME COURT OF THE UNITED STATES.

Comes the Appellant, the Louisville and Nashville Railroad Company, through its Counsel, and shows to the Court that the above entitled case was brought to this Court by an appeal taken from a decree of the Honorable District Court for the Southern Division of the Southern District of Mississippi, sitting in equity, dismissing the bill of complaint for want of jurisdiction in said Court. A brief statement of the matter involved is hereto attached and made part hereof, and the reason for the application is that the only question in issue is the jurisdiction of the Court below.

Wherefore, Appellant moves the Court to advance the hearing of said cause, as provided by Rule 32 of this Honorable Court.

GREGORY L. SMITH,
H. L. STONE,
Solicitors for Appellant.

STATEMENT OF THE CASE.

This appeal is taken from a decree of the United States District Court for the Southern Division of the Southern District of Mississippi, sustaining a demurrer to, and dismissing a bill of complaint in equity, filed by the Appellant, the Louisville & Nashville Railroad Company, against Appellee, the Western Union Telegraph Company. The question raised by the demurrer was want of jurisdiction of the person of the Defendant. Rec. p. 37 (*57).

The order allowing the appeal contains a certificate that the jurisdiction of the District Court was the only question determined by the decree from which the appeal was prayed, and is the only question presented for the determination of the Supreme Court upon such appeal, and it is the only question presented by the assignment of error. Rec. p. 38 (*59).

Appellant (Complainant in the bill) is a corporation created by and organized under the laws of Kentucky, while Appellee (the Defendant in the bill) is a corporation created by and organized under the laws of New York. The purpose of the bill is to enforce a claim by Appellant (Complainant) to the exclusive possession and use of its railroad rights of way in the Counties of Jackson, Harrison and Hancock, in the State of Mississippi, and to cancel, as clouds upon Appellant's title to such rights of way, three judgments obtained by Appellee in eminent domain proceedings purporting to confer upon Appellee the right to take possession of and use parts of Appellant's said rights of way. These rights of way are all situated in the judicial district and division in which the bill of complaint was filed. Rec. p. 1 (*2).

The contentions presented by the demurrs are:

1. That the bill of complaint could only be filed in the district whereof either the Complainant (Appellant), or Defendant (Appellee) was an inhabitant.
2. That Section 919 of the Code of Mississippi of 1906 is relied upon to confer jurisdiction, and that it did not confer jurisdiction upon any federal court.
3. For other reasons apparent. Rec. p. 36 (*54).

The propositions urged in the lower Court under this ground of demurrer were:

1st. That the judgments sought to be canceled are void upon the faces of the several proceedings in which they were rendered, and do not, therefore, constitute clouds upon Complainant's (Appellant's) title to its rights of way.

2nd. That each application for condemnation alleges in substance as follows:

"Your petitioner further stipulates and agrees that if at any time in the future, after the erection of its poles, cross-arms and wires, it should become necessary for the said defendant to change the location of its tracks or construct new tracks, or side-tracks, where the same do not now exist, and for such purpose to use and occupy that portion of said right of way on which petitioner's poles are, or may be, set, cross-arms placed thereon, and wires strung, your petitioner will, at its own expense, upon reasonable notice from said defendants, remove said poles, cross-arms and wires to such other point or points on said defendant's right of way as shall be designated by said defendants." Rec. p. 30 (*45).

That under these allegations the use of Appellant's right of way cannot damage it, and that a muniment of title to the property of another that results in no damage does not constitute an incumbrance or cloud upon the title thereto.

Section 929 of the Code of Mississippi purports to confer upon telegraph companies the right to condemn parts of railroad rights of way for the construction of new telegraph lines. It reads as follows:

"Telegraph and telephone companies, for the purpose of constructing new lines, are empowered to exercise the right of eminent domain, as provided in the chapter on that subject. And interurban street railways, for the purpose of constructing new lines between cities, towns or villages, may exercise the right of eminent domain as provided in the chapter on that subject, to condemn property between such cities, towns or villages."

The bill alleges that the proceedings were for the pur-

pose of condemning a right of way for the continued maintenance of a line of telegraph, already existing upon such right of way, and that there was no law authorizing condemnation for such a purpose. Paragraph V of the bill of complaint, Rec. p. 3 (*4).

The procedure for such condemnation is prescribed by Chapter 43 of the Code of Mississippi, and Section 1856, which is part of Chapter 43, prescribes that the proceedings shall be commenced by presenting an application for such condemnation to the clerk of the Circuit Court of the county where the property sought to be condemned lies, and requires such clerk to endorse thereon the appointment of some competent justice of the peace to constitute, with a jury, a special court of eminent domain. The clerk is also required to fix a time and place for the organization of such court.

Section 1856 reads as follows:

"When any person or corporation having the right so to do shall desire to exercise the right of eminent domain, he or it shall make application therefor in writing, and the owners of the property sought to be condemned and mortgagees, trustees, or other persons having an interest therein or a lien thereon, shall be made defendants thereto, which shall state with a certainty the right and describe the property sought to be condemned, showing that of each defendant separately. The application shall be presented to the clerk of the Circuit Court of the county, who shall indorse thereon his appointment of a competent justice of the peace of the county in which the property or some part thereof, is situated, to constitute, with a jury, the special court of eminent domain; and he shall fix the time and place in the county for the organization thereof."

The bill further shows that the application to condemn rights of way in Jackson and Harrison Counties were not presented to the clerks of the Circuit Courts of those counties, but to the deputy clerks, and that such **deputy** clerks—and not the clerks—made orders, appointing justices of the peace and fixing times and places for the organization of the emi-

inent domain courts. Paragraph VII of the bill of complaint Rec. pp. 3 and 4 (*5 and 6).

In Hancock County the application was presented to the clerk of the Circuit Court and he made an order appointing a justice of the peace and fixing the time and place for the organization of the eminent domain court. Par. VII of the bill of complaint, Rec. p. 4 (*7). In each instance the order was made by a separate writing and was not endorsed upon the application. Par. VII of the bill of complain, Rec. pp. 3, 4, 5 (*5, 6, 7).

Subsequent to the making of these orders and before the organization of the eminent domain court under them, the clerks of the Circuit Courts of Jackson and Hancock Counties, each endorsed upon the application for condemnation in his county, a statement that he had previously made an order, appointing a justice and fixing a day for the organization of an eminent domain court and that he then made an endorsement upon the application to further evidence the making of such order. Par. VII of the bill of complaint; Rec. pp. 4 and 5 (*6 and 7). No such endorsement was made by the clerk of the Circuit Court of Jackson County.

The bill charges that the judgments in Jackson and Harrison Counties are void for the further reason that the deputy clerks had no power to appoint justices of the peace or fix the time and place for the organization of courts of eminent domain. Chapter 43 of the Code of Mississippi prescribes the exact form of the organization of the court; the charge to be given the jury; the verdict to be rendered by them; the term of their verdict, and of the judgment to be rendered by them. Par. IX of the bill of complaint; Rec. p. 10 (*15). These provisions are found in Sections 1862, 1865, 1866 and 1867, which are as follows:

"Section 1862. When an issue shall be ready for trial, a jury of twelve men shall be organized. Each party shall be allowed four peremptory challenges, and as many more as he can show cause for; and whatever is cause for challenge in the Circuit Court shall be cause in the special

court. The alphabetical list of jurors shall be called in regular order until the jury shall be completed, or until it be exhausted; and if it be exhausted before a jury is obtained, the sheriff shall summon qualified jurors of the county from the bystanders until the jury be complete; but it shall be a cause of challenge to any person offered as a juror that he had, directly or indirectly, contrived to be summoned as such, or had come to any place that he might be so summoned. The jurors drawn who are not empaneled shall not thereby be discharged, if there be other issues to be tried, but shall remain in attendance on the Court. While being impaneled each juror may be sworn truthfully to answer all questions that may be propounded to him. **The justice of the peace shall not for any cause quash the proceedings or dismiss the court of eminent domain, but must proceed with the condemnation.** No irregularity in drawing, summoning, or empanelling the jury shall vitiate the verdict or judgment, and no appeal or certiorari shall be allowed until after verdict by the jury." Par. XII of the bill of complaint; Rec. p. 14 (*21).

"Section 1865. The justice shall instruct the jury, in writing, in the following words: 'The defendant is entitled to recover damages in this cause, and it devolves on you honestly and impartially to estimate the sum thereof, according to the evidence adduced on the trial, the weight and credibility of which you are the sole judges. The defendant is entitled to due compensation, not only for the value of the property to be actually taken as specified in the application, but also for damages, if any, which may result to him as a consequence of the taking; and you are not to deduct therefrom anything on account of the supposed benefits incident to the public use for which the application is made.' The instruction shall be signed by the justice, be filed, and become a part of the record. Par. XII of the bill of complaint; Rec. p. 14 (*21).

"Section 1866. The verdict of the jury shall be in the following form: 'We, the jury, find that the defendant (naming him) will be damaged, by the taking of his property for the public use, in the sum of _____ dollars', and it shall be signed by each of them. In case an informal or unsigned verdict be returned, it may be amended. Upon the rendition of a verdict, the jurors, other than those selected from the bystanders, shall not be discharged

if there be other issues to be tried." Par. XII of the bill of complaint; Rec. p. 14 (*21).

"Section 1867. Upon the return of the verdict, the Court shall enter a judgment as follows, viz:

"In this case the claim of (naming him or them) to have condemned certain lands named in the application, to wit: (here describe property), being the property of (here name the owner) was submitted to a jury composed or (here insert their names) on the _____ day of _____ A. D. _____, and the jury returned a verdict fixing said defendant's due compensation and damages at _____ dollars, and the verdict was received and entered. Now, upon payment of the said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application. Let the applicant pay the costs for which execution may issue. _____, J. P." Par. XII of the bill of complaint; Rec. p. 15 (*22).

Section 1871 of the Code of Mississippi authorizes an appeal to the Circuit Court. Under the laws of Mississippi, as construed by the Supreme Court of that State, the persons whose property is sought to be condemned has no right to be heard either in the eminent domain proceedings or upon an appeal therefrom upon any defense he may have to the proceedings. The sole question that can be determined in such proceedings being the value of the property taken. If the property owner desires to defend against the taking of his property, he must do so by a bill in equity to cancel the judgment after it has been rendered. Par. XII of the bill of complaint; Rec. p. 15 (*22).

Vinegar Bend Lumber Co. vs. Oak Grove & Georgetown R. R. Co., 89 Miss., 117; 43 Sou. Rep., 292.

Under this law, as so construed, Appellant (Complainant) further sought by its bill to cancel the several judgments complained of.

Under Sections 5263-5269, of the United States Compiled Statutes of 1901, Congress has prescribed the terms upon which telegraph companies may occupy the rights of way of

post roads, and the bill of complaint alleges that Appellant's (Complainant's) railroad in the Counties of Jackson, Harrison and Hancock, in the State of Mississippi is a post road, and that the several states are excluded from granting to telegraph companies, rights of way over them—upon conditions other than those prescribed by Congress. The bill further seeks to cancel the judgments upon this ground. Par. XVI of the bill of complaint; Rec. p. 18 (*27).

Section 1868 of the Code of Mississippi of 1906 is part of the chapter of laws under which these proceedings were conducted and provides in part as follows:

"Upon the return of the verdict, and entry of the judgment, if the applicant pay the defendant whose compensation is fixed by it, or tender to him the amount so found and pay the costs, he or it shall have the right to enter in and upon and take possession of the property of such defendant, so condemned and appropriate the same to the public use defined in the application."

Pursuant to this provision and to the forms of such judgment prescribed by the laws of Mississippi, each of the judgments attacked by the bill of complaint contain the following provisions:

"Now, then, upon payment of said award, applicant can enter in and upon said property and devote it to public use as prayed for in the application." Par. VIII of the bill of complaint; Rec. pp. 7 (*10), 8 (*12), 10 (*15).

The Appellee, the Western Union Telegraph Company, after it had obtained its judgments of condemnation, tendered to Appellant, the Louisville & Nashville Railroad Company, the amount of the award fixed by such judgment. Par. VIII of the bill of complaint; Rec. pp. 7 (*10), 8 (*12).)

The demurrer to the bill of complaint was as follows:

"Comes the Defendant, the Western Union Telegraph Company, for the special purpose and no other, until the question herein raised is decided, of objecting to the jurisdiction of this Court, by protestation, and confessing or

acknowledging all or any part of the matters or things in said bill of complaint contained to be true, in such manner and form as the same are herein set forth and alleged, demurs to the said bill and for the cause of demurrer shows:

1. Because it appears from the face of the bill that neither the Plaintiff nor the Defendant is a citizen, resident or inhabitant of the southern division of the Southern District of Mississippi.

2. Because Section 919 of the Code of Mississippi set out and relied upon in said bill as conferring jurisdiction upon this Court does not confer jurisdiction and could not. The jurisdiction of this Court being determined by the Constitution and laws of the United States.

3. Because the said Section 919 applies only to the suits brought by residents of the State of Mississippi against foreign corporations in the State Courts and was not intended in any way to affect the jurisdiction of the Federal Courts, or suits brought therein.

4. For other reasons apparent."

Rec. p. 36 (*54).

The demurrer was sustained by the District Court and the cause dismissed for want of jurisdiction. Rec. p. 37 (*56).

The decree sustaining the demurrer to the jurisdiction of the Court was as follows:

UNITED STATES OF AMERICA,
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DIVISION OF THE
SOUTHERN DISTRICT OF MISSISSIPPI.

LOUISVILLE & NASHVILLE RAILROAD CO.

vs.

WESTERN UNION TELEGRAPH CO.

The special demurrer of Defendant to the jurisdiction of the Court having been set down for hearing by Complainant

and coming on for hearing by agreement at Kosiusko, Miss., on this, the 9th day of July, A. D. 1912, and the Court having heard said demurrer and the argument of counsel for Complainant and Defendant thereon, and finding that Defendant is a corporation inhabitant and resident of the State of New York and that Complainant is a corporation and resident of the State of Kentucky and that the said bill is not a bill to remove clouds from title to lands in the division and district aforesaid and that this Court has no jurisdiction over the Defendant in this suit, and that Defendant is not suable in this case in this district or division, but is suable only in the district whereof it is an inhabitant, it is therefore ordered, adjudged and decreed that said demurrer be and it is hereby sustained, and said bill dismissed at the costs of Complainant.

Ordered, adjudged and decreed at Kosciusko, Miss., this 9th day of July, A. D. 1912.

(Signed.) H. C. NILES, Judge.

July 9th, 1912.

The application for an appeal with the order allowing the same is:

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI.

LOUISVILLE & NASHVILLE RAILROAD CO.

Complainant,

vs.

THE WESTERN UNION TELEGRAPH CO.,

Defendant

The above named Complainant, conceiving itself aggrieved by the decree rendered in the above entitled cause on the 9th

day of July, 1912, and filed July 13, 1912, whereby it was decreed that the said United States District Court was without jurisdiction of said cause, and that the bill of complaint be for that reason dismissed, now prays that this, its appeal to the Supreme Court of the United States, may be allowed for a review of the decree of the said United States District Court for the Southern Division of the Southern District of Mississippi, and that a citation in due form be issued.

That a certificate be made that the jurisdiction of said District Court is the only question involved in said appeal, and the only question by said appeal presented for review to the Supreme Court of the United States.

And that the transcript of the record and proceedings and papers upon which said final decree was made, duly authenticated, may be sent to the United States Supreme Court.

And now, at the time of the filing of this petition for appeal, the said Louisville & Nashville Railroad Company files an assignment of errors, setting up separately and particularly each error asserted and intended to be urged in the said United States Supreme Court, and presents herewith for approval its appeal bond.

LOUISVILLE & NASHVILLE RAILROAD CO.,

(Signed.) By GREGORY L. SMITH,

HENRY L. STONE,

Its Solicitors.

The foregoing petition having been presented and duly considered, it is ordered that the appeal therein prayed be allowed: that the appeal bond presented by the said Louisville & Nashville Railroad Company with its said petition be, and is hereby accepted and approved; and that the clerk of this Court cause a duly authorized transcript of the record, proceedings and papers upon which the decree appealed from was rendered to be transmitted to the Supreme Court of the United States.

And it is hereby certified that the jurisdiction of said District Court for the Southern Division of the Southern Dis-

trict of Mississippi of said cause was the only question determined by the decree from which the said appeal is prayed, and the only question presented by said appeal to the Supreme Court of the United States for review.

Made this, the 26th day of July, 1912.

(Signed.) H. C. NILES,

Judge of the United States District Court for the Southern Division of the Southern District of Mississippi.

ASSIGNMENTS OF ERROR.

The following are the assignments of error:

"Comes the Louisville & Nashville Railroad Company, the plaintiff in error, by its counsel, and respectfully represents that it feels itself aggrieved by the proceedings and decree of the United States District Court for the Southern Division of the Southern District of Mississippi, made on the 9th day of July, 1912, and filed July 13, 1912, in the above entitled cause, and assigns error thereto, as follows:

1. The Court erred in sustaining the demurrer to the bill of complaint, and in decreeing that it had no jurisdiction of said cause and dismissing the bill of complaint for want of such jurisdiction.

2. The Court erred in sustaining the demurrers to the bill of complaint and in decreeing that the bill of complaint by which said cause was commenced is not a bill to remove clouds from title to lands in the Southern Division of the Southern District of Mississippi, and that said Court has no jurisdiction over the defendant in said suits and that the bill of complaint be dismissed for want of jurisdiction.

3. The Court erred in sustaining the demurrer to the bill of complaint and in decreeing that the bill of complaint by which said cause was commenced is not a bill to remove clouds from title to lands in the Southern Division of the Southern District of Mississippi, and that defendant is not suable in this cause in said district or division, but is suable only in the district whereof it is

an inhabitant, and in dismissing the bill for want of such jurisdiction."

GREGORY L. SMITH,
HENRY L. STONE,
Solicitors for Appellant.

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1912.

No. 769.

LOUISVILLE & NASHVILLE RAILROAD CO.,
Appellant,

vs.

WESTERN UNION TELEGRAPH CO., Appellee.

To the Western Union Telegraph Company, and to Mr. Rushton Taggart, Mr. George H. Fearons and to J. B. Harris and E. J. Bowers, Counsel for the Appellee in the above entitled cause:

Notice is hereby given that on the _____ day of _____, 1912, a motion to advance the hearing of the said cause will be made in the Supreme Court of the United States.

A copy of said motion, together with the brief that will be filed on behalf of the Appellant upon the hearing of said cause, are herewith furnished you.

GREGORY L. SMITH,
HENRY L. STONE,
Counsel for the Appellant.

STATE OF ALABAMA, County of Mobile.

Personally appeared before me, K. Walsh, a Notary Pub-

lic in and for said State and County, Gregory L. Smith, who being sworn, deposes and says that on the ----- day of November, 1912, he deposited in the United States Post-office at Mobile, Alabama, postpaid, copies of the notice, motion and brief, to which this affidavit is attached, addressed as follows, viz:

One copy addressed to Mr. Rushton Taggart, at No. 195 Broadway, New York City, New York.

One copy addressed to Mr. Geo. H. Fearons, at No. 195 Broadway, New York City, New York.

One copy to Mr. J. B. Harris, Jackson, Mississippi.

Mr. Rushton Taggart and Mr. Geo. H. Fearons are the attorneys of record for Appellee in said cause.

That the postoffice address of Mr. Rushton Taggart and also Mr. Geo. H. Fearons, is No. 195 Broadway, New York City, New York.

The Affiant further deposes and says that the said several notices, so mailed, should, by due process of mail, have reached each of the said several parties to whom they are addressed, three weeks before the time fixed by the notice given them.

GREGORY L. SMITH,

Subscribed and sworn to before me this ----- day of November, 1912.

K. WALSH,

Notary Public, Mobile County, Alabama.

